

**The Ohio Department of Agriculture and the National Pollutant Discharge  
Elimination System Program – Program Description 40 CFR 123.22**

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**The Ohio Department of Agriculture and the National Pollutant Discharge Elimination  
System Program – Program Description 40 C.F.R. § 123.22**

**I. LEGAL AUTHORITY AND PERMITS**

- A. Department Overview
- B. Legal Authority for the Permitting Program – A General Overview
- C. Legal Representation

**A. Department Overview**

The Ohio Department of Agriculture (“hereinafter referred to as the “ODA”), is the second oldest State agency in Ohio, and evolved from "An Act for the Encouragement of Agriculture" passed by the General Assembly on February 27, 1846, to establish agricultural fairs and promote farming.

The ODA is responsible for enforcing State and federal laws and regulations, primarily in the areas of food safety, food production and food processing. The ODA has responsibility for conducting inspections and protecting livestock in Ohio, implementing disease prevention measures, and assuring a safe and sanitary food supply, and enforcing regulatory requirements through administrative or court proceedings. Furthermore, ODA is Ohio’s lead agency for the enforcement of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) through the United States Environmental Protection Agency (hereinafter referred to as the “U.S. EPA”)’s Office of Pesticide Programs. ODA also oversees county and independent fairs, amusement rides safety, serves as the custodian of the primary weights and measures standards in Ohio, and helps Ohio farmers and food processors market their products.

Also, the ODA is responsible for protecting the environment and water quality in the State of Ohio. Ohio Revised Code (“Ohio Rev. Code”) Chapter 903 provides the ODA with authority to regulate and control manure and other wastes generated at large Concentrated Animal Feeding Facilities (“CAFFs”) in order to minimize water pollution and protect waters of the state. Also, ODA will serve as the lead agency responsible for the administration and enforcement of the National Pollutant Discharge Elimination System (“NPDES”) Program with respect to pollution and storm water discharges from Concentrated Animal Feeding Operations (“CAFOs”) and Animal Feeding Operations (“AFOs”) upon U.S. EPA approval. The ODA will accomplish its mandate to protect the environment and citizens of Ohio through public notice and participation requirements, compliance inspections of large livestock operations, administrative enforcement, and proceedings in state courts for injunctive relief and penalties for civil or criminal violations of state laws, regulations, and permit requirements.

**B. Legal Authority for the Permitting Program – A General Overview**

As established in the Federal Clean Water Act (hereinafter “Clean Water Act” or “CWA”) the NPDES permit program controls water pollution by regulating point sources that discharge

pollutants into waters of the United States. Pursuant to 40 C.F.R. § 122.2, the definition of point source includes CAFOs.

On March 11, 1974, the U.S. EPA approved the State of Ohio to administer the NPDES permit program pursuant to Section 402(b) of the CWA. The Ohio Environmental Protection Agency (hereinafter referred to as the “Ohio EPA”) currently administers the NPDES permit program for all point sources in Ohio, including the discharge of pollutants and storm water from CAFOs and AFOs. Ohio Rev. Code Chapter 6111 provides authority for Ohio EPA to issue NPDES permits for the discharge of pollutants from existing and new facilities or activities to waters of the United States to the same extent as required under the NPDES permit program administered by the U.S. EPA, pursuant to Section 402 of the CWA.

Substitute Senate Bill 141, which became effective on March 15, 2001, enacted Ohio Rev. Code Chapter 903, entitled “Concentrated Animal Feeding Facilities.”<sup>1</sup> Ohio Rev. Code § 903.08 provides the ODA with the statutory authority to serve as the lead agency to administer the NPDES program with respect to the discharge of pollutants from CAFOs, and storm water discharges from AFOs. Ohio Rev. Code § 903.08 provides the Director of Agriculture (hereinafter referred to as the “Director” or “Director of ODA”) with the following power and authority:

(1) The director of agriculture is authorized to participate in the national pollutant discharge elimination system in accordance with the Federal Water Pollution Control Act. Not later than one hundred eighty days after March 15, 2001, the director shall prepare a state program in accordance with 40 C.F.R. 123.21 for point sources that are subject to this section and shall submit the program to the United States environmental protection agency for approval.

(2) On and after the date on which the United States environmental protection agency approves the state program submitted under division (A)(1) of this section, the authority to enforce terms and conditions of NPDES permits previously issued under division (J) of section 6111.03 or under section 6111.035 of the ORC for the discharging, transporting, or handling of storm water from an animal feeding facility or of pollutants from concentrated animal feeding operations is transferred from the director of environmental protection to the director of agriculture. Thereafter, the director of environmental protection shall have no authority to enforce the terms and conditions of those NPDES permits. After the transfer of authority under division (A)(2) of this section, the NPDES permits concerning which authority has been transferred shall be considered to have been issued under this section.

The ODA Division of Livestock Environmental Permitting (hereinafter referred to as “DLEP” or “ODA DLEP”) will develop and issue NPDES permits to CAFOs and AFOs in accordance with permitting procedures established under Ohio Rev. Code Chapter 903 and Ohio Administrative Code (“Ohio Adm. Code”) Chapter 901:10. NPDES permits issued by the ODA will contain effluent limitations, discharge limits and prohibitions, schedules of compliance, best management practices, and monitoring and reporting requirements to control and/or prevent

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<sup>1</sup> H.B. 152, effective November 3, 2003, amended Ohio Rev. Code Chapter 903 to conform to changes in EPA’s NPDES rules for CAFOs, adopted April 14, 2003. Subsequent revisions have been made to Ohio Rev. Code § 903.08 in S.B. 393 and H.B. 363 to conform to the outcome of Waterkeeper Alliance et al. v. EPA, 399 F. 3d 486 (2d Cir. 2005) and to address additional issues raised by EPA.

discharges to waters of the State. The permitting process outlined in Ohio Rev. Code Chapter 903 and Ohio Adm. Code 901:10 allow DLEP to monitor and control the quantity, quality, and types of discharges to state waters from CAFOs and AFOs.

The partial NPDES program to be administered by ODA applies to NPDES individual permits, general permits, and construction and industrial storm water permits for CAFOs. Additionally, ODA will be responsible for the administration of the NPDES program for both construction and industrial storm water permits issued to AFOs. The Ohio EPA will retain jurisdiction over construction and industrial storm water permits for agricultural activities that are not located on AFOs (i.e., grain and cropping agricultural activities) and for CAFOs that discharge to a Publicly Owned Treatment Works (POTW).

Ohio Revised Code Chapter 903 authorizes the Director of ODA to adopt, amend, or repeal all rules, regulations, and standards necessary for the protection of the environment from pollution and storm water discharges attributed to CAFOs or AFOs. Under Ohio Rev. Code § 903.08, the Director is given specific authority to issue, deny, modify, suspend, and revoke NPDES permits. The enforcement of NPDES permits is authorized by Ohio Rev. Code § 903.17 and the administrative rules promulgated pursuant to Ohio Rev. Code § 903.10.

Ohio Revised Code § 903.10(F) grants the Director the authority to establish all of the following concerning NPDES permits:

- (1) The designation of concentrated animal feeding operations subject to NPDES permit requirements under section 903.08 of the Revised Code;
- (2) Effluent limitations governing discharges into waters of the State that are authorized by permits;
- (3) Variances from effluent limitations and other permit requirements to the extent that the variances are consistent with the Act;
- (4) Terms and conditions to be included in a permit, including, as applicable, best management practices; installation of discharge or water quality monitoring methods or equipment; creation and retention of records; submission of periodic reports; schedules of compliance; net volume, net weight, and, where necessary, concentration and mass loading limits of manure that may be discharged into waters of the State; and authorized duration and frequency of any discharges into waters of the State;
- (5) Procedures for the submission of applications for permits and notices of intent to be covered by general permits, including information that must be included in the applications and notices;
- (6) The amount of the fee that must be submitted with an application for a permit;
- (7) Procedures for processing permit applications, including public notice and participation requirements;
- (8) Procedures for notifying the U.S. EPA of the submission of permit applications, the Director's action on those applications, and any other reasonable and relevant information;
- (9) Procedures for notifying and receiving and responding to recommendations from other states whose waters may be affected by the issuance of a permit;
- (10) Procedures for the transfer of permits to new owners or operators;
- (11) Grounds and procedures for the issuance, denial, modification, suspension, or revocation of permits, including general permits;

(12) A definition of "general NPDES permit" that establishes categories of point sources to be covered under such a permit and a definition of "individual NPDES permit" together with the criteria for issuing a general NPDES permit and the criteria for determining a person's eligibility to discharge under a general NPDES permit.

Ohio Revised Code § 903.10 also requires rules relating to NPDES permits shall be consistent with the requirements of the CWA. Copies of the Ohio laws and rules applicable to the ODA program are included in Volume I of this application for NPDES program revision. The Ohio Attorney General's Statement of Legal Authority in support of the program revision is also included in Volume I. Background information about the ODA DLEP, including annual budget, table of organization, position descriptions, and permit forms are also included in Volume II of the program submission.

### **C. Legal Representation**

The ODA uses both in-house counsel ("Office of Legal Counsel") and the Office of the Ohio Attorney General ("Attorney General") for legal representation. The Office of Legal Counsel exists within ODA and is composed of the Chief Legal Counsel, Assistant Chief Legal Counsel, and two staff attorneys. ODA's Enforcement Division provides investigative support – conducting both criminal and administrative investigations – for all of ODA's regulatory divisions.

The Office of Legal Counsel provides legal consultation and representation for the various offices and divisions in ODA, including the DLEP, in regards to permitting, enforcement, grants, contracts, personnel, legislation, intergovernmental agreements, and other such matters. The Office of Legal Counsel performs the following legal functions:

1. Legal review of draft permit and enforcement actions;
2. Legal analysis and other training, support and direction during the legislation and promulgation processes for administrative regulations;
3. Preparation of the administrative record of proceedings and related documents, along with case support in adjudication hearings and appeals to the Environmental Review Appeals Commission ("ERAC"); and
4. Coordination and direction of enforcement and criminal investigations and referrals.

In certain instances the ODA is required by law to request the Attorney General to provide legal representation. The Attorney General acts as counsel to ODA in all civil suits as provided in Ohio Rev. Code §§ 903.16, 903.17, 903.18, 903.30, and 903.99. This includes civil suits in courts of common pleas brought for injunctive relief under Ohio Rev. Code §§ 903.16 and 903.17, as well as in enforcement proceedings involving penalties and compliance orders. The Attorney General's concurrence is also required by Ohio Rev. Code § 109.02 to settle or resolve any suits, disputes, or claims for penalties. Finally, criminal offenses may be prosecuted by the Attorney General's Office pursuant to Ohio Rev. Code §§ 903.30 and 903.99 for violations of NPDES permits and the proper management of livestock operations.

Furthermore, the prosecuting attorneys of each county have the discretion to prosecute any criminal violation of state environmental laws within the jurisdiction of the county. The ODA

cooperates fully with county prosecuting attorneys through the Office of the Ohio Attorney General.

## **II. PERMITS PROGRAM – OVERVIEW<sup>2</sup>**

- A. General Permitting Procedures for All Permits Issued by ODA
- B. General NPDES Permits for CAFOs and AFOs
- C. NPDES Permits for Small and Medium CAFOs
- D. Inspections

### **A. General Permitting Procedures for All Permits Issued by ODA**

Under ODA's jurisdiction, DLEP is responsible for regulating the construction, modification, operation, and management of large CAFFs. Also, DLEP is responsible for regulating any activity from CAFOs and AFOs which results or may result in the discharge of pollutants or storm water into waters of the State within the scope of coverage of the NPDES program established under Ohio Rev. Code Chapter 903.

The types of permits issued by DLEP will fall into one of several categories:

1. Individual Permits to Install for CAFFs issued under State authority (CAFF means a Concentrated Animal Feeding Facility<sup>3</sup>);
2. Individual Permits to Operate for CAFFs issued under State authority;
3. Individual permits for CAFFs that include State Permits to Operate requirements, and if applicable, NPDES requirements for operations and industrial storm water;
4. General Permits to Operate that will include State operating requirements and if applicable, NPDES requirements for operations, and NPDES requirements for industrial storm water;
5. Individual NPDES permits for operations and for industrial storm water; and
6. NPDES construction storm water permits, both general construction permits for AFOs and CAFOs<sup>4</sup>, and where appropriate, individual construction permits.

Upon receiving a permit application from an owner or operator of a CAFF seeking permit coverage, the DLEP will determine if the facility is eligible for permit coverage. The DLEP may request additional information from the facility to make its decision about permit coverage. DLEP will issue individual NPDES permits to CAFO operations for activities that require NPDES coverage, and will develop NPDES general permits for certain classes of CAFO and AFO activities. CAFO owners and operators required to seek NPDES permit coverage must either submit an application for an individual permit or submit a Notice of Intent ("NOI") for coverage under a general permit, if a general permit is required for the CAFO's activities. DLEP will require the submission of a CAFO-NPDES Form as part of the application process for individual CAFO

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<sup>2</sup> See Parts III and IV below for details on permitting, public participation, inspections, and enforcement.

<sup>3</sup> Ohio Rev. Code § 903.01(E) defines a CAFF as an animal feeding facility that meets the design capacity or threshold number of animal species listed under Ohio Rev. Code § 903.01(M).

<sup>4</sup> Ohio Rev. Code § 903.01(F) defines a CAFO as an animal feeding facility that meets the threshold number of animal species listed under Ohio Rev. Code § 903.01(M), (Q), or (FF), or is designated a CAFO by the Director.



NPDES permits, and require an NOI form to be submitted for the NPDES General Construction Storm Water Permits or general permits for other categories of discharges from similar operations.

Upon receipt of an application for a CAFO NPDES permit, DLEP will conduct an administrative review of the NPDES permit application and prepare a draft NPDES permit containing effluent limitations, operating conditions, and monitoring and reporting requirements. Also, DLEP will conduct an anti-degradation review as required under Ohio Rev. Code §§ 6111.12 and 903.08, and Ohio Adm. Code Chapter 901:10-3. For those permits which U.S. EPA has not waived review, copies of the permit application, draft permit or proposed action<sup>5</sup>, public notice and fact sheet (or statements of basis), and any other relevant information will be forwarded to U.S. EPA for review. U.S. EPA will have 30 days to review, comment upon, make recommendations, or issue a general objection to the draft permit. If DLEP and U.S. EPA agree upon the draft permit, DLEP will issue a public notice of the draft permit. However, if U.S. EPA makes a timely objection to the issuance of the draft permit then the draft permit cannot become final. Upon receipt of U.S. EPA's objection, DLEP must either amend the draft permit to eliminate the objection, or withdraw the draft permit as provided in Ohio Adm. Code 901:10-06-03. If a draft permit fails to meet the requirements of the CWA and U.S. EPA issues a subsequent "interim objection", exclusive authority to issue the permit will transfer to U.S. EPA following the procedures and timeframes set forth in 40 C.F.R. § 123.44.

Ohio Revised Code § 903.09 and O.A.C. Chapter 901:10-6 contain public notice and public participation requirements for all permits issued by ODA. Pursuant to Ohio Rev. Code § 903.09, prior to issuing or modifying an NPDES permit, DLEP must mail notice of the issuance of a draft permit and a copy of the draft permit to the applicant and local county commissioners and township trustees, and publish the notice in a newspaper of general circulation in the county where the facility or discharge will be located or proposed to be located. Also, notice of the issuance of a draft NPDES permit must be provided to any other persons (including state or federal agencies) entitled to notice under the CWA.

Publication of the notice must be made at least 30 days prior to DLEP holding a public meeting on the draft permit. For a draft NPDES permit subject to an anti-degradation review, notice must be published at least 30 days prior to holding a public meeting to allow time for public review of the permit application and consideration of anti-degradation issues. A public notice for the issuance of a draft NPDES permit must include a statement of the draft permit, the address where written comments regarding the draft permit may be submitted, a request for a public meeting, and the open and close of the 30 day public comment period, in addition to other required information. If the DLEP receives written public comments in an amount that demonstrate significant public interest in the draft permit, then DLEP will schedule one public meeting in the county where the facility is located to provide information to the public and hear comments pertinent to the draft permit.<sup>6</sup> ODA will transmit to U.S. EPA a copy of any significant written comments or significant comments presented at the public meeting objecting to the draft NPDES permit.

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<sup>5</sup> Ohio Rev. Code §903.09 describes a "proposed action" as the Director's intent to deny, modify, suspend, or revoke a permit.

<sup>6</sup> Ohio Adm. Code 901:10-6-04 defines "significant public interest" to mean statements made in writing by twenty or more people expressing interest in the draft permit before the director or in the anti-degradation review and requesting a public meeting. Significant public interest may also include expressed interest by one or more public officials.

At the close of the public comment period, all comments received are collected and reviewed. If comments are received regarding any draft permit, a response to comments or "Responsiveness Summary" shall be prepared for the Director. For those permits for which U.S. EPA has not waived review, the "Responsiveness Summary" will be forwarded to U.S. EPA for review. ODA may issue the final NPDES permit without further review from U.S. EPA if: (i) no substantive changes were made and the permit to be finalized does not differ from the draft permit, (ii) U.S. EPA has not objected to the permit, and (iii) no significant public comments were made regarding the permit. ODA must publish notice of the issuance of the final NPDES permit once in a newspaper of general circulation in the county where the facility or discharge is located. On the other hand, if there are any substantive changes to the draft permit, a permit incorporating those substantive changes is forwarded to U.S. EPA for review and re-public noticed. Upon U.S. EPA's concurrence with the proposed changes, a final permit is issued and public noticed. Pursuant to Ohio Rev. Code § 903.09, any order by the Director issuing a permit without a proposed action, including an NPDES permit, may be appealed to the ERAC.

As of 2014, DLEP has issued approximately 139 individual PTIs, and 387 PTOs and PTO renewals to CAFFs in the State of Ohio. Copies of permit application forms and examples of permit orders are included in Volume 2 of this program revision application. All permits of all types are developed and tracked by DLEP Engineering staff.

Under Ohio Rev. Code § 903.07, ODA also has a State program that certifies livestock managers who are responsible for the management and handling of manure at a Major Concentrated Animal Feeding Facilities ("MCAFF")<sup>7</sup> or who annually transport and land apply quantities of manure larger than those set forth in Ohio Adm. Code 901:10-1-06. There are approximately 243 persons currently enrolled as certified livestock managers in the State of Ohio.

Given the outcome of *National Pork Producers v. EPA*, (March 15, 2011), 5th Cir., No. 08-61093, ODA estimates that a minority of the holders of individual State operating permits will seek NPDES permit coverage through either a general or individual NPDES permit. ODA anticipates that the remainder of the existing large CAFOs in Ohio will not apply for a NPDES permit, but will still be required to obtain a State operating permit. ODA further anticipates that a number of medium and small CAFOs will be required to obtain NPDES permit coverage. Currently, Ohio EPA has 51 CAFOs under either general (1) or individual (50) NPDES permits. Of those facilities, 39 are Large CAFOs and 12 are medium CAFOs. A similar number of facilities are likely to be permitted by ODA upon the transfer of the NPDES program, although some of the Large CAFOs may elect not to renew their NPDES permits given the decision in *National Pork Producers*. However, the Director may require some small or medium CAFOs to obtain an NPDES permit upon inspection and discovery of a discharge of pollutants to waters of the state.

## **B. General NPDES Permits for CAFOs and AFOs**

Ohio Revised Code § 903.08 authorizes ODA to issue NPDES General Permits instead of

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<sup>7</sup> Ohio Rev. Code § 903.01(N) defines a "Major Concentrated Animal Feeding Facility" as a CAFF with a total design capacity of more than ten times then number of animals of a "large CAFO".

individual NPDES permits to CAFOs and AFOs for categories of point sources for which the Director determines all of the following apply:

1. Any discharges authorized by a general permit will have only minimal cumulative adverse effects on the environment when the discharges are considered collectively and individually.
2. The discharges are more appropriately authorized by a general permit than by an individual permit.
3. Each category of point sources satisfies the criteria established in rules.

Similar to the process described above in Section A, ODA will prepare a draft general permit, fact sheet, and public notice, and send the materials to U.S. EPA for review. U.S. EPA has 90 days from the date of receipt of the draft general permit to comment, object, or make recommendations to the draft general permit. Upon concurrence by U.S. EPA, the draft general permit is public noticed in accordance with Ohio Rev. Code § 903.09 and Ohio Adm. Code 901:10-6. In the case of a Statewide general permit, the public notice is published in major newspapers throughout the State.

As specified in Ohio Adm. Code 901:10-4, ODA will issue general permits that require facilities to submit a Notice of Intent ("NOI") form to be considered for coverage. This NOI will require specific information pertaining to the facility that is seeking coverage, including all of the information set forth in Ohio Adm. Code 901:10-4-03(C), and payment of a fee. The NOI will be reviewed by DLEP to ascertain whether the facility qualifies for coverage under the general permit and whether the NOI includes all information required by Ohio Adm. Code 901:10-4-03(C) and the general permit. If the information submitted appears incomplete or requires clarification, supplementation, or other changes, the DLEP engineering staff will notify the applicant and request additional information. Once the DLEP makes a preliminary determination that the NOI meets all applicable requirements, DLEP staff will notify the public of the Director's proposal to grant a certificate of coverage to the applicant and make available for public review and comment the NOI submitted by the applicant, including the manure management plan and the draft terms of the manure management plan to be incorporated into the permit.

A comment period of 30 days shall be provided for public review and comment, with notice of the comment period being provided to the applicant and published on the DLEP web site. During the comment period any interested person may submit written comments on the notice and may request a public meeting. The grounds for a public meeting shall be the same as those provided in Ohio Adm. Codes rules 901:10-6-01(D) and 901:10-6-04(D) for individual NPDES permits. Any public meeting shall be conducted as described in Ohio Adm. Code 901:10-6-04, except that notice regarding the scheduling of the public meeting shall be provided on the DLEP web site, rather than through publication in the legal notice section of a newspaper. The provisions of Ohio Adm. Code 901:10-6-04(J) shall also apply to the public comment period. The Director shall, if necessary, require the applicant to revise the manure management plan in order to be granted permit coverage. When review of the application is complete and, if after the public comment period and review of any public comments, DLEP has determined that the facility may be



covered under the general permit, written acceptance of coverage will be sent to the facility.

When coverage under a general permit issued using the procedure explained above expires, the permittee must send in a notification of intent to renew. Upon receipt of this notification, the procedures for issuance are repeated. When an individual permit expires, the permittee must also submit a renewal application, and, at that time, DLEP will determine whether the permittee should receive a renewed individual permit or be covered under a general permit.

Once covered under a general permit, the permittee may request to be covered under an individual permit. The Director may require any discharger authorized by a general permit to apply for and obtain an individual permit. *See* Ohio Adm. Code 901:10-4-01.

The general permit procedures for issuance, enforcement, surveillance, tracking, and all other administrative tasks are performed in the same manner as those for individual permits. Therefore, the discussion on individual permit issuance procedures contained here applies to general permits unless otherwise provided. The issuance of a general permit follows the procedures in Ohio Adm. Code Chapter 901:10-6 relative to fact sheets, draft permits, U.S. EPA review, public notices, response to comments, public meetings, appeals, etc. Facilities applying for coverage under a general permit follow the basic procedures in Ohio Adm. Code Chapter 901:10-4 relative to the application review process.

To develop an appropriate general permit, DLEP must do extensive research into the permit conditions and effluent limitations contained in individual permits issued to that category of discharges. DLEP must then establish appropriate applicability criteria, effluent limitations, and other permit conditions for the category or type of discharge. The permit is then placed in the review process as a draft general permit and is subject to public notice requirements.

As outlined in the Memorandum of Agreement ("MOA") between ODA and U.S. EPA, U.S. EPA will have 90 days from the date of receipt of a draft general permit from ODA to comment upon, object to, and make recommendations regarding the draft general permit. If U.S. EPA does not provide an objection to the draft general permit within 90 days, then ODA may assume that U.S. EPA has no objection to the permit and can continue the process of issuing the permit. Once the general permit is issued, persons wishing to be covered under the general permit must apply for coverage by submitting an NOI and a Manure Management Plan ("MMP") to DLEP.<sup>8</sup>

DLEP Engineering staff has the responsibility to develop general permits. This group also prepares and issues individual permits for small, medium, and large CAFOs, individual and general construction stormwater permits for AFOs, and individual permits for MCAFFs. Storm Water Pollution Prevention Plans, Manure Management Plans and Annual Reports will be submitted and reviewed for verification of best management practices and regulatory compliance. In accordance with the requirements of the Clean Water Act, permits may be reopened and modified to address changes in state or federal regulations and statutes, changes in the State Water Quality Management Plan, changes in State Water Quality Standards, and the addition of new co-permittees or operators, or other modifications.

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<sup>8</sup> Note: ODA uses the term Manure Management Plan in its program in place of Nutrient Management Plan.

Based on the decision in *National Pork Producers v. EPA*, and future guidance and rules to be provided by U.S. EPA, it is anticipated that a number of the facilities that have sought a NPDES permit from Ohio EPA will withdraw their application and not seek a permit from ODA. Below are ODA's estimates on the number of permits that could be expected based on existing regulatory conditions.

### **1. NPDES - Individual Permits Large, Medium, and Small CAFOs**

ODA estimates that approximately 50 of the existing 212 Large CAFOs operating under an individual State operating permit will be eligible for a general NPDES permit/State operating permit. ODA estimates that another 20 small and medium CAFO's will require NPDES permits, which would equate to 70 NPDES permits. Assuming 20% of these would be renewed annually (5-year term of permit), approximately 14 permits would be issued per year. Expected technical workdays for each permit are 10 days, and therefore 140 technical workdays would be required per year for the general NPDES permits for Large CAFOs.

### **2. NPDES – General Construction Stormwater Permit for Large, Medium, and Small CAFOs**

ODA estimates that 30 new construction stormwater permits will be applied for and granted for small, medium and large operations. ODA receives, on an annual basis, approximately 10 new Permits to Install on large operations that would require a construction stormwater permit and it is anticipated that another 5 small or medium facilities will also require a construction stormwater permit annually. Therefore, ODA anticipates annually approximately 15 construction stormwater permits. Expected technical workdays for each permit are 2 days, and therefore 30 technical workdays would be required per year for issuing the General Construction Stormwater permits.

### **3. Other State Permitting**

A majority of the technical review currently being completed by the DLEP engineering staff on permits involves the review of the Permit to Install (PTI) and Permit to Operate (PTO). ODA estimates that 20 new PTI/PTO applications will be received annually. Based on technical hours spent on past permits, approximately 100 technical hours are spent on average applications. These hours include reviewing the application, meetings and site visits with the producer and/or consultant, participating in public meetings and drafting responsiveness summaries, and participating in pre-construction meetings, and serving as witnesses and client representatives in administrative appeals of final permits issued by the Director. The technical workdays for each PTI/PTO are approximately 12.5 days and therefore require approximately 250 technical workdays. In addition, DLEP receives approximately 40 PTO renewals (20% of 212 permitted facilities per year) that require renewals every 5 years. On average, each PTO renewal requires approximately 5 workdays to complete. Therefore, the PTO renewals require approximately 200 technical workdays per year.

#### **4. Summary of Technical Time for Permitting**

All the technical workdays cited above requires 620 days per year for DLEP to perform the expected permitting. Currently, three engineers are on staff that provide 675 workdays a year, assuming 225 days of work per engineer per year. The estimates provided above are very conservative since most of the time dedicated to the technical review and issuance of State permits will include the technical review and issuance of NPDES permits. Most of the information currently required for the state PTOs is also required for the NPDES permits that will be issued to CAFOs and AFOs.

#### **C. Small and Medium CAFOs**

The Director may designate or make a determination that an animal feeding facility is a small or medium CAFO. Pursuant to Ohio Adm. Code 901:10-3-07(A), the Director may *designate* any animal feeding facility as a CAFO upon determining that the animal feeding facility is a significant contributor of manure or pollutants to waters of the State. In making that determination, the Director will consider the following factors:

1. The size of the animal feeding facility and the amount of manure or pollutants reaching waters of the State;
2. The location of the animal feeding facility relative to waters of the State;
3. The means of conveyance of manure or pollutants into waters of the State;
4. The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of manure or pollutants into waters of the State; and
5. Other relevant factors.

Ohio Adm. Code 901:10-3-07(C) provides that if the Director *determines* that an animal feeding facility shall be required to be permitted as a medium or small CAFO, then the owner or operator shall apply to the Director for an NPDES permit as a CAFO.

Any animal feeding facility that is designated or determined to be a small or medium CAFO may be required by the Director to comply with the applicable rules for PTI under Ohio Adm. Code 901:10-2 if the existing facility cannot comply with best management practices to prevent manure or pollutant discharges. AFOs defined as Medium CAFOs shall apply for a permit (as required by Ohio Adm. Code 901:10-2-01(A)(3)), and ODA may elect to refrain from issuing a permit where the owner or operator has promptly eliminated the conditions that caused the AFO to be defined as a Medium CAFO.

Best Professional Judgment ("BPJ") is utilized to determine permit limits. ODA anticipates approximately 12 medium CAFOs to be transferred from Ohio EPA to ODA for regulatory oversight.

Nonetheless, small or medium CAFOs will be allowed to exit the permit program at the end of the five-year permit term if they meet certain conditions. To exit the permit program, a small or medium facility would be expected to demonstrate that it has successfully addressed the conditions that caused it to be designated or determined as a CAFO and that it is fully implementing a

Comprehensive Nutrient Management Plan or Manure Management Plan, as approved by ODA. The small or medium CAFO will be expected to offer evidence and certify it is in full compliance with its permit at the end of the permit term. In the event that a small or medium CAFO that exited the permit program has a subsequent discharge, ODA will make the facility subject to permitting and possible enforcement.

#### **D. Inspections**

There are currently three (3) DLEP inspectors available to conduct permit inspections, spill and complaint inspections, and ambient monitoring and sampling activities throughout the State of Ohio for permitted facilities. DLEP inspectors conduct at two full inspections per year of all permitted facilities. Additional personnel hours are dedicated to the investigation of citizen complaints (see Ohio Adm. Code 901:10-5-01 and Part V, below) and unregulated facilities, and for spill response investigations reported to DLEP.

### **III. PERMITTING: GENERAL ADMINISTRATIVE PROCEDURES**

- A. Publication of Rules
- B. Procedures for Public Hearings and Information
- C. Procedures for Conflict of Interest Questions
- D. Procedures for the Continuing Planning Process
  - 1. Statutory Requirements
  - 2. Rules in Support of the CPP and Water Quality Standards
  - 3. Agreements to Implement the CPP
- E. Procedures for Public Availability of Permit Information and Confidentiality of Information
- F. Water Quality Management Planning
- G. The Water Quality Management Plan
- H. Water Quality Management Plan Certification Procedures

#### **A. Publication of Rules**

Rules are published in the official state journal, the Register of Ohio, which is the responsibility of the Ohio Legislative Service Commission. The Register of Ohio is on the Internet, and agencies statewide utilize it to file administrative rules electronically (*see* Ohio Rev. Code § 103.051). The Register makes available for public review notice of rules and documents related to proposed and/or emergency rule making conducted under the Ohio Administrative Procedure Act (Ohio Rev. Code Chapter 119). Documents are available in electronic format.

A notice and summary of the text of each rule is published in advance of adoption, and there are special procedures for emergency rules. All requirements for rule publication are found in Ohio Rev. Code Chapter 119, specifically Section 119.03. A notice of intent to adopt, amend, or rescind rules is published in the Register of Ohio. The rules must be made available to the public

upon request and made the subject of a public hearing. The Department must provide notice and opportunity to receive public comments concerning the proposed rules, as provided in Ohio Rev. Code § 119.03. Emergency rule-making procedures are found in Ohio Rev. Code § 119.03.

A complete copy of ODA's "The Rule-Making Process (2006)" and "Rule Filing Process (2014)", included in Volume 1 of this application for program revision. The documents describe the internal procedures followed for the adoption, amendment, and publication of ODA administrative rules.

The Director, Deputy Director, or, as appropriate, Assistant Director, initiates the rulemaking process for an ODA division, which becomes the originating division. The Office of Legal Counsel serves as technical expert on all rules and provides legal review for all proposed rules.

In accordance with Ohio Rev. Code §§ 119.03, 119.037, and 127.18, a public notice, followed by submission of the fiscal and economic impact of the proposed rule (i.e., rule summary and fiscal analysis) is required. Copies of the public notice, rule summary and fiscal analysis, and proposed rule are forwarded to the Register of Ohio for publication. Copies of the public notice, rule summary and fiscal analysis, and proposed rule are also sent to the Ohio Secretary of State and the Director of the Ohio Legislative Service Commission. On the same date, these same documents and any information packets containing these documents are also made available to the public.

The Office of Legal Counsel and the originating division proposing the rule conduct a public hearing and receive public comments. The proposed rule and any comments are forwarded to a legislative oversight committee called the Joint Committee on Agency Rule Review ("JCARR"). If amendments or revisions are necessary, these are also forwarded.

Finally, the Office of Legal Counsel and the originating division appear before the JCARR if legislative hearings are held. Following the close of the comment period and the conclusion of public and legislative hearings, the originating division decides whether to finalize the proposed rule. The Office of Legal Counsel, once advised of the originating division's decision, proceeds with the appropriate administrative action, e.g., an order of rule adoption for the Director's signature. Rules cannot take effect until at least 10 days following final adoption by the Director.

If JCARR proposes to invalidate a proposed rule in whole or in part, the originating division decides whether the proposed rule:

1. Should be withdrawn;
2. Should have portions unacceptable to JCARR severed; or
3. Should be repropose with substantive changes, but only after the term of the General Assembly that invalidated the proposed rules has expired, unless the General Assembly will, by concurrent resolution of both House and Senate, authorize ODA to continue rule-making proceedings.

A notice of amendment or rescission of rules that contain substantive changes to the proposed rules is published in the Register of Ohio and provided to all interested parties.

An emergency rule may be adopted using the procedures described in Ohio Rev. Code § 119.03. An emergency rule is adopted and becomes effective when signed by the Governor. ODA may then adopt the emergency rule immediately, and it becomes effective on the tenth day the rule is filed in final form with the Ohio Legislative Service Commission, JCARR, and the Secretary of State, or later if so designated by the Department. The full text of the emergency rule is published in the Register of Ohio.

An emergency rule becomes invalid at the end of the ninetieth day it is in effect. Prior to that date ODA may adopt the emergency rule as a non-emergency rule by complying with the regular procedure prescribed for the adoption, amendment, and rescission of non-emergency rules. The Department cannot use emergency rule proceedings to readopt the emergency rule.

#### **B. Procedures for Public Hearings and Information**

Ohio Revised Code § 903.09 and Ohio Adm. Code Chapter 901:10-6 provide for public notice of draft permits by sending notices to the permit applicant, interested parties, local officials, and the general public on a mailing list maintained by DLEP and by advertisement in the newspapers specified by rule. The notice states a public meeting<sup>9</sup> may be requested and that a public meeting will be conducted if there is significant public interest. Pursuant to Ohio Adm. Code 901:10-6-04, “significant public interest” means statements made in writing by twenty or more persons expressing interest in the draft permit before the Director or in the anti-degradation review of an NPDES permit, and requesting a public meeting. Significant public interest may also include expressed interest by one or more public officials in the draft permit. Nonetheless, the public comment period is required to be at least 30 days from the date of the notice and may be longer to accommodate the timeframe for a public meeting. The required information to be advertised is also provided in rule.

If a public meeting is scheduled by DLEP, a public notice is made by sending notice to persons on a mailing list maintained by DLEP and by advertisement in the newspapers in the area of the facility to be permitted. A 30 day public notice period is provided prior to the public meeting.

Public meetings are conducted by ODA and are held in the county where the proposed facility will be located or in a contiguous county. After the oral comments from the public meeting are transcribed and written comments are received, a response to comments or “Responsiveness Summary,” is prepared and becomes part of the public record on the permit application in question. Copies of the “Responsiveness Summary” are mailed to local officials and anyone who offered significant comments (either oral or written comments) on the permit during the open public comment period or public meeting. The Responsiveness Summary and facility-specific fact sheets are also made available on the ODA website. ODA has authority to hold a public meeting to receive public comments in accordance with Ohio Adm. Code 901:10-6-04. The requirements for notice of the public meeting are found in Ohio Adm. Code 901:10-6-02. Examples of documents related to public participation are included in Volume 2 of this application for program revision.

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<sup>9</sup> Ohio Revised Code § 903.09 and Ohio Adm. Code Chapter 901:10-6 use the term “public meeting” instead of “public hearing,” as used in EPA’s NPDES rules.



### **C. Procedures for Conflict of Interest Questions**

Ohio Revised Code Chapter 102 prohibits any conflicts of interest involving a public servant. In particular, Ohio Rev. Code § 102.03 provides that “no public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.”

Ohio Revised Code § 903.081 was enacted to elaborate upon the ethical requirements for public officers in Ohio set forth in Ohio Rev. Code Chapter 102:

For purposes of section 903.08 of the Revised Code, no person shall approve all or portions of a NPDES permit if the person receives or has received during the two years prior to the receipt of an application for a NPDES permit a significant portion of income from any NPDES permittee or any applicant for a NPDES permit. In addition, no person may serve on a board or commission that approves all or portions of a NPDES permit, including taking such action pursuant to an appeal of a NPDES permit if the person receives or has received during the two years prior to serving on the board or commission or the filing of the appeal a significant portion of income from any NPDES permittee or any applicant for a NPDES permit.

### **D. Procedures for the Continuing Planning Process**

The Ohio EPA Division of Surface Water maintains a continuing planning process document to describe the processes utilized by Ohio EPA in the implementation of the water quality management program. Ohio EPA is responsible for periodically reviewing and revising the Continuing Planning Process (“CPP”) to ensure that it is current and consistent with the federal regulations which outline the required content of the CPP. The preparation of the CPP is mandated under Section 303(e)(3) of the Water Quality Act of 1987. The requirements for the continuing planning process are described and outlined in 40 C.F.R. Part 130.5.

Ohio EPA’s Division of Surface Water has all of the following:

- ◆ Process for updating and maintaining Water Quality Management Plans and schedules for revisions.
- ◆ Process for incorporating elements of any applicable areawide waste treatment plans under Section 208, and applicable basin plans under Section 209.
- ◆ Process for establishing and implementing water quality standards and schedules of compliance.
- ◆ Process for developing TMDLs and individual water quality-based effluent limitations under Section 303(d) of the CWA and 40 C.F.R. § 130.7.
- ◆ Process for developing effluent limitations and schedules of compliance. This must be as stringent as Sections 301(b)(1) and (2), 306, 307, and any applicable water quality standards under Section 303 of the CWA.

- ◆ Process for determining the priority of permit issuance.
- ◆ Process for assuring adequate controls on disposition of residual waste from water treatment processing.
- ◆ Process for assuring adequate authority for intergovernmental cooperation in implementation of the Water Quality Management Plan.

NPDES permits issued by ODA are required to conform to the elements of the CPP by statute, rule, and through procedures for coordination and communication described in the Memorandum of Agreement between the EPA and the State of Ohio, as well as in a Memorandum of Agreement between ODA and Ohio EPA, dated August 12, 2002. Copies of these MOAs are included in Volume 1 of this application for program revision.

### 1. Statutory Requirements

By statute, ODA is required to adhere to the Clean Water Act in the Department's administration of the NPDES program in Ohio. Ohio Rev. Code § 903.08 sets forth these requirements. Pursuant to Ohio Rev. Code § 903.08, Director of ODA is required to establish terms and conditions of NPDES permits designed to achieve and maintain full compliance with national effluent limitations, national standards of performance for new sources, the most current water quality standards adopted under Ohio Rev. Code § 6111.041, the most current anti-degradation policy adopted under Ohio Rev. Code § 6111.12, and other requirements of the Clean Water Act. In Ohio, Ohio EPA promulgates the state's water quality standards as part of that Agency's duty to carry out the CPP in Ohio. Water quality standards in Ohio are duly promulgated in accordance with Ohio Rev. Code § 6111.041:

In furtherance of sections 6111.01 to 6111.08 of the Revised Code, the director of environmental protection shall adopt standards of water quality to be applicable to the waters of the state. Such standards shall be adopted pursuant to a schedule established, and from time to time amended, by the director, to apply to the various waters of the state, in accordance with Chapter 119. of the Revised Code. Such standards shall be adopted in accordance with section 303 of the "Federal Water Pollution Control Act" and shall be designed to improve and maintain the quality of such waters for the purpose of protecting the public health and welfare, and to enable the present and planned use of such waters for public water supplies, industrial and agricultural needs, propagation of fish, aquatic life, and wildlife, and recreational purposes. Such standards may be amended from time to time as determined by the director. Prior to establishing, amending, or repealing standards of water quality the director shall, after due notice, conduct public hearings thereon. Notice of hearings shall specify the waters to which the standards relate, and the time, date, and place of hearing.

Standards of quality for the waters of the state, or any amendment or repeal thereof, become effective upon adoption by the director. The director shall implement the standards so established in the issuance, revocation, modification, or denial of permits.

In addition, Ohio Rev. Code § 903.08 provides, in pertinent part, as follows:



(A) (1) The director of agriculture is authorized to participate in the national pollutant discharge elimination system in accordance with the Federal Water Pollution Control Act. Not later than one hundred eighty days after March 15, 2001, the director shall prepare a state program in accordance with 40 C.F.R. 123.21 for point sources that are subject to this section and shall submit the program to the United States environmental protection agency for approval.

\* \* \*

(E) The director of agriculture shall issue NPDES permits in accordance with this section and section 903.09 of the Revised Code. The director shall deny an application for a NPDES permit if any of the following applies:

- (1) The application contains misleading or false information.
- (2) The administrator of the United States environmental protection agency objects in writing to the issuance of the NPDES permit in accordance with section 402(d) of the Federal Water Pollution Control Act.
- (3) The director determines that the proposed discharge or source would conflict with an areawide waste treatment management plan adopted in accordance with section 208 of the Federal Water Pollution Control Act.

Additional grounds for the denial of a NPDES permit shall be those established in this chapter and rules.

\* \* \*

(G) The director of agriculture shall establish terms and conditions of NPDES permits in accordance with rules. Terms and conditions shall be designed to achieve and maintain full compliance with national effluent limitations, national standards of performance for new sources, the most current water quality standards adopted under section 6111.041 [6111.04.1] of the Revised Code, the most current antidegradation policy adopted under section 6111.12 of the Revised Code, and other requirements of the Federal Water Pollution Control Act. In establishing the terms and conditions of a NPDES permit, the director, to the extent consistent with that act, shall consider technical feasibility and economic costs and shall allow a reasonable period of time for coming into compliance with the permit.

\* \* \*

- (M)(1) No person shall violate any effluent limitation established by rule.
- (2) No person shall violate any other provision of a NPDES permit issued under this section.
  - (3) Compliance with a NPDES permit issued under this section constitutes compliance with this section.

(N) This section, including the state program authorized in division (A)(1) of this section, shall be administered in a manner consistent with the Federal Water Pollution Control Act.

## 2. Rules In Support of the CPP and Water Quality Standards

Ohio Administrative Code 901:10-1-03 sets forth the Director's criteria for decision-making with respect to issuing, denying, modifying, suspending, or revoking NPDES permits. In particular, Ohio Adm. Code 901:10-1-03(C) provides that the Director shall deny, modify, suspend, or revoke an NPDES permit if the Director determines:

- (1) Discharge from the facility will prevent or interfere with attainment or maintenance of applicable water quality standards adopted under section 6111.041 of the Revised Code and the most current anti-degradation policy adopted under section 6111.12 of the Revised Code; or
- (2) Discharge from the facility will not achieve compliance with national effluent standards; or
- (3) The administrator of the United States environmental protection agency objects in writing to the issuance of the NPDES permit in accordance with section 402(d) of the Act; or
- (4) The proposed discharge or source will conflict with an areawide waste treatment management plan adopted in accordance with section 208 of the Act; or
- (5) Forms, notices, or reports required pursuant to the terms and conditions of the NPDES permit are false or inaccurate;
- (6) The discharge is of any radiological, chemical, or biological warfare agent or high-level radioactive waste or medical waste; or
- (7) The United States Army Corps of Engineers for the district in which the discharge is located objects in writing to the issuance of the NPDES permit as substantially impairing navigation or anchorage; or
- (8) Discharge from the facility will not achieve national standards of performance for new sources; or
- (9) There is a change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge; or
- (10) The permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination; or
- (11) The applicant or owner or operator is required to obtain a state or other appropriate certification under section 401 of the Act and 40 CFR section 124.53 and that certification has not been obtained or waived;
- (12) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states; or
- (13) Discharge from the facility will not achieve and maintain compliance with other requirements of the act and the regulations promulgated thereunder.

In order to make these decisions, however, the Director must provide notice and opportunity to comment to affected parties. *See* Ohio Adm. Code Chapter 901:10-6. In addition to the general public and local officials, Ohio Adm. Code rule 901:10-6-02 states that notice must be provided to the U.S. EPA Regional Administrator, appropriate state and governmental agencies potentially affected by the draft NPDES permit, any agency responsible for an areawide waste treatment management plan or "208" plan, and the affected district office of the Army Corps of Engineers.

### 3. Agreements to Implement the CPP

ODA has entered into three important inter-governmental agreements for the Department's administration of the NPDES program. Copies of these Memoranda of Agreements are included in Volume 1 of this proposed program revision.

First, in the Memorandum of Agreement between the U.S. EPA and the State of Ohio required by 40 CFR § 123.24, the ODA makes the following commitments to U.S. EPA in order to implement the CPP.

- a. Permit Development. Draft permits will be prepared in accordance with applicable federal and state laws and regulations and the MOA. The effluent limitations will be developed in accordance with state and federal standards and limitations including effluent guidelines, water quality standards, standards of performance, toxic effluent standards or prohibitions, best management practices, and Ohio's Water Quality Management Plan under sections 301, 302, 303, 304, 306, 307, 308, and 402 of the CWA. ODA will coordinate with Ohio EPA to develop water quality based permits, any toxic effluent limited permits (or prohibitions) and any permits limited by Ohio's Water Quality Management Plan by first providing Ohio EPA with lists of pending and approved permit applications.
- b. Areawide 208 Plans. ODA will review any areawide 208 planning document and a copy of the Ohio EPA Continuing Planning Process as updated on the Ohio EPA website. ODA will consult with Ohio EPA on a permit-by-permit basis in order to maintain compliance with the Section 208 requirements. Ohio EPA will decide if any proposed discharge would be in conflict with Ohio's areawide 208 plans and notify ODA of that decision.
- c. Anti-degradation and Related Wasteload Allocations. At least 14 days before ODA publishes public notice of receipt of an NPDES permit for which an anti-degradation review is applicable, ODA will transmit copies to Ohio EPA of the NPDES Part D permit anti-degradation application and ODA's preliminary determination as to whether the permit meets an exclusion or waiver under the anti-degradation policy in OAC 3745-1-05(D) and whether the wasteload allocation will suffice to meet water quality based effluent limits for NPDES permits as provided in ORC 903.09(C).
- d. Adjudication Cases and Enforcement Proceedings. Ohio EPA will provide technical assistance as needed and on a case-to case basis in any legal matters concerning toxic effluent limitations or water quality based effluent limits (including a wasteload analysis in support of anti-degradation review) for NPDES permits on appeal before the Environmental Review Appeals Commission, or NPDES permits subject to enforcement proceedings by ODA.
- e. General NPDES Permits. As required by OAC 901:10-4-01 general NPDES permits to operate will not be issued for new discharges associated with CAFOs requiring an NPDES permit if the receiving waters are designated as outstanding national resource waters, outstanding high quality waters, superior high quality waters, or state resource

Under Ohio Rev. Code § 903.082, if an AFO has caused agricultural pollution by failing to comply with the standards under Ohio Rev. Code § 1511.02, the Chief of ODNR-DSWR may issue to the Director of ODA a copy of an order issued by the Chief that specifies that the AFO has caused agricultural pollution, has failed to comply with applicable standards, and that the facility shall obtain permits from ODA.

**E. Procedures for Public Availability of Permit Information and Confidentiality of Information**

DLEP maintains a file system that is open to the public during normal work hours on regular workdays. The files are located at the A.B. Graham Building, 8995 East Main Street, Reynoldsburg, Ohio, on the first floor. The building, and in particular the file viewing area, is wheelchair accessible.

All written information pertaining to a facility is required to be maintained in the office's files consistent with the requirements of Ohio's public records law. Documents arrive in the Office via mail, personal delivery, electronic mail or facsimile, and are routed to the appropriate staff for disposition. Documents are organized by facility and maintained in electronic or paper files associated with that facility.

When documents are received, they are reviewed to determine which facility file they will be stored. If a facility file does not exist, DLEP will create a file. This file will be created in hard copy and electronically in the DLEP database system. Both types of records can be upgraded by Administration as the need arises. All public records in these files are available to the public upon request. Public records requests submitted to the Department and the responses to these requests are tracked on a department-wide basis in the ODA Legal Department using a computerized spreadsheet system into which the request, the requester (if known), and the time at which the response was delivered are entered.

The public is notified of the availability of documents through several methods. DLEP maintains a website that notifies the public of draft permits issued and final permits issued. Facility-specific fact sheets are available on the website. Links to applicable laws and regulations are also maintained on the website.

The public is also notified of the availability of documents through the public notices that are required by Ohio Rev. Code § 903.09. When draft and final permits are issued by DLEP, a public notice is published in the county newspapers. A statewide and county specific "interested party" list has been created and maintained by DLEP so that emails can be sent regarding draft permits that are issued. Interested parties can request to be included in as many of these lists as they would like to receive the public notice and a facility fact sheet.

Requests for information under the Federal Freedom of Information Act or Ohio Rev. Code Chapter 149, "Documents, Reports, and Records," are sent to the DLEP office. Depending on the nature or number of document(s) requested or the complexity of the request, various DLEP staff members may be assigned to respond to the request. The staff member assigned to process the

waters, or to receiving waters that discharge to a waterbody with one of these designations within two stream miles of the discharge.

- f. Total Maximum Daily Loads and Watershed Plans. ODA and Ohio EPA will coordinate fieldwork for any TMDL work occurring where waterbodies are potentially impacted by animal feeding operations, including sampling and monitoring in those watersheds where CAFOs are located or to be located.

Ohio EPA may discover animal feeding facilities or CAFOs that are unpermitted or that are discharging without the required permits. In either case, Ohio EPA shall notify ODA of its findings and transmit information to ODA for ODA's use.

Ohio EPA and ODA will work together on TMDL implementation plans, including public participation and public meetings; discussion and development of load and wasteload allocations; strategies on NPDES permit development and issuance; and coordinated permit schedules with respect to the Ohio EPA basin schedule of permit work.

Second, the Memorandum of Agreement between Ohio EPA and ODA describes the procedures employed for the actual implementation of the work described in the Memorandum of Agreement between the U.S. EPA and the State of Ohio. In addition to coordinating work of Ohio EPA's CPP, this two-party agreement aids both departments in managing the transfer of the NPDES program for CAFOs from Ohio EPA to ODA. The Memorandum of Agreement between Ohio EPA and ODA complements the planning efforts of Ohio EPA's CPP with coordinated inspections, complaint investigations, emergency response, and enforcement.

Third, the Ohio EPA, ODA, and the Ohio Department of Natural Resources, Division of Soil and Water Resources (ODNR-DSWR) have agreed to coordinate with each other in the implementation and administration of this program. ODNR-DSWR is responsible for the rules enacted pursuant to Ohio Rev. Code § 1511.05 and establishing criteria and policies for agricultural pollution abatement, and cost share programs for assisting owners and operators with installing and operating best management practices in agriculture. By coordinating its efforts with Ohio EPA and ODA, ODNR-DSWR and the local Soil and Water Conservation Districts (SWCDs) can assist in achieving Ohio water quality standards through inspections, complaint investigations, emergency response, cost sharing, and enforcement.

The State of Ohio has local SWCDs in each of Ohio's 88 counties. The chief of the division of soil and water conservation enters into cooperative agreements with the board of supervisors of any SWCD desiring to enter into such agreements pursuant to Ohio Rev. Code §§ 1511.05 and 1515.08. These agreements were created to obtain compliance with rules and orders of the chief pertaining to agricultural pollution abatement and cost share programs. The local SWCDs offer technical assistance regarding the implementation, inspection and funding of the agricultural pollution abatement program; aid farmers in creating and implementing Comprehensive Nutrient Management Plans; investigate complaints; developing operation and management plans; developing plans for the control and prevention of soil erosion; and assistance and education regarding composting.



request retrieves the document(s) and determines whether there is a need for clarification of the request. The staff member then contacts the party requesting the material, acknowledges the request, requests clarification if necessary and determines the extent of the request and the cost of reproducing the material. The requestor is invited to come to ODA and view the material in person in lieu of copying it. If a public records request requires an urgent response and the requesting party asks DLEP to copy and send the requested materials to them, DLEP will make copies, fax an invoice, request that payment be made overnight, and ship the materials by return overnight carrier. If the need is less urgent, other arrangements are made with the requesting party. Increasingly, ODA Legal Division uses electronic mail to receive and respond to information requests.

Individuals who wish to review information in the main office file system are escorted to the file review area. The main office file for the facility is pulled by a staff member and given to the individual for review. Copies of documents in the main office file are available at a reasonable rate. Copy fees can be waived under certain circumstances.

Confidentiality provisions may be found at Ohio Rev. Code §§ 149.43 and 903.10(I) and Ohio Adm. Code 901:10-1-05. These statutes and rule state that records kept by the ODA in the performance of its functions shall be available to the public unless nondisclosure is requested in writing at the time of submission, and ODA determines that the information may be kept confidential.

ODA legal counsel may classify information as confidential if the Director makes a written determination that confidentiality is necessary to protect trade secrets. Ohio's public records law, specifically Ohio Rev. Code § 149.43, also provides for nondisclosure of trial preparation records, confidential law enforcement investigatory records, or other records whose release is prohibited by State or federal law.

Ohio Revised Code § 903.10(I) requires ODA to adopt regulations for the protection of trade secrets from public disclosure. ODA has adopted Ohio Adm. Code 901:10-1-05 to address the protection of trade secrets. Under Ohio Adm. Code 901:10-1-05(F), confidential information may be disclosed without a permittee's consent to authorized federal or state officers or employees when necessary for an enforcement action or when otherwise required by the Clean Water Act. Ohio Adm. Code 901:10-1-05(C) also provides that the following categories of information are deemed public records for which claims of trade secrecy will be denied:

- (1) The name and address of any permit applicant or permittee;
- (2) Permit forms, permit applications, permits and sampling and effluent data;
- (3) Information required by NPDES application forms provided by ODA including information submitted on the forms themselves and any attachments used to supply information required by the forms; and
- (4) Any public comments, testimony or other documentation from the public concerning a permit application.

Ohio Administrative Code 901:10-1-05 provides that information submitted to DLEP by a facility pursuant to the statutes or regulations may be claimed as confidential. Any claim of confidentiality must be asserted in writing in the manner described in the rule at the time of

submission of the information. If no claim is asserted at the time the information is submitted, the information will be made available to the public without further notice.

A facility must submit a written request for confidentiality accompanied by documents that support the request. All materials submitted with this written request and marked with the words "trade secret," shall be accorded confidentiality pending a determination by the Director on whether to grant the request. This determination shall be made within 45 days from the date of the request. If the Director determines that the material should not be afforded confidentiality, he will issue a written denial of the request for nondisclosure to the requestor. No written denial of the request is necessary when the material submitted as confidential falls within any of the four categories of information listed in Ohio Adm. Code 901:10-1-05(C) for which claims of trade secrecy are denied by rule.

If the request for confidentiality is granted, the material remains confidential and is not made available to the public. Such material is maintained separately. The information determined to be confidential is segregated from the public records maintained on the same facility. It will be placed in a locked file labeled "confidential", with access appropriately controlled. ODA removes confidential information from its files and returns it to the submitter when such information is no longer necessary or required for purposes of the Act or for the State regulatory program.

#### **F. Water Quality Management Planning**

In order to describe the complete NPDES program for the State of Ohio, all of the following are the legal responsibility of Ohio EPA pursuant to Ohio Rev. Code Chapter 6111:

- ◆ The Water Quality Management Plan
- ◆ Continuing Planning Process
- ◆ Water Quality Standards
- ◆ Basin Boundaries and Inventories
- ◆ Integrated Water Quality Monitoring and Assessment
- ◆ The Water Quality Data Summary:
- ◆ Nonpoint Source Assessment
- ◆ Nonpoint Source Management Plan
- ◆ Wasteload Allocations

The general purpose of the water quality management and planning process is to ensure that the waters of the State meet established water quality standards, and thereby maintain all designated uses for each waterbody. The goals of the planning process are to ensure that necessary programs are established to achieve water quality goals and standards, and to provide procedures to implement those programs. The planning process also provides a method for setting priorities in the state's water pollution control program based upon water quality concerns and needs for water pollution control.

## **G. The Water Quality Management Plan**

The Water Quality Management Plan ("WQMP") identifies water quality problems, details the State's objectives and strategies for their resolution, and outlines the institutional framework necessary for the effective implementation of the proposed strategies. To meet these objectives, the WQMP must contain the detail required for providing the necessary analyses and information for management decisions. The WQMP is, therefore, a management tool containing a wide range of information that is integrated in an assessment of the sources and impacts of water pollution, as well as the possible management alternatives available for resolution of the problems.

The State's WQMP has been developed in a continuing planning process requiring the compilation of information and preparation of documents which are instrumental to the effective execution of the State's water pollution control programs. The documents describe legislative authorizations and regulations, program procedures and descriptions, water quality standards, hydrologic boundary maps, water quality data, discharger inventories, problem assessments, treatment needs, assessments, and total maximum daily load and wasteload allocation reports. Each individual component of the WQMP presents information and/or data integral to the overall management and planning process. Those components are described below.

### *Continuing Planning Process*

As discussed above, the CPP describes the processes and procedures employed by Ohio EPA, Division of Surface Water, in carrying out the requirements of the Clean Water Act. Its purpose is to help identify needed improvements in organizational structure and procedure and to serve as guidance for more effective management of the State's water quality management programs.

### *Water Quality Standards*

These standards are set forth in Ohio Adm. Code Chapter 3745-1 and include descriptions of designated uses for which waters of the State are to be protected and the numerical and narrative criteria, such as chemical concentration limits or biological criteria, which are designed to protect and measure attainment of the designated uses.

### *Basin Boundaries and Inventories*

Water quality standards and the issuance of NPDES permits are implemented through water basin strategies and schedules that include waterbodies within each basin.

### *Integrated Water Quality Monitoring and Assessment*

Ohio's Integrated Water Quality Monitoring and Assessment Report, which is submitted to U.S. EPA every two years, presents both a water quality inventory and assessments of impaired waters derived from the water quality inventory, in order to fulfill the reporting requirements of Sections 305(b), 303(d) and 314 of the Clean Water Act. This report offers "raw" data as well as summaries and standard statistics. It presents water quality impacts and designated use impairment evaluations for each watershed or large river unit and represents a continuing review process for



determining the current water quality conditions in the State. Ohio EPA utilizes this water quality information to determine magnitude, extent, and sources of water quality impairment as evidenced in the data gathered from the ambient water quality monitoring network and special studies. Water quality assessment information required by Sections 304(l) and 319 of the Act are also included in this inventory.

#### *The Water Quality Data Summary*

The Water Quality Data Summary contains various types of water quality data obtained from the State's ambient water quality monitoring network. It provides data and summary statistics for temperature, pH, dissolved oxygen, chlorides, sulfates, phosphorus, turbidity, color, solids (suspended and dissolved), metals, and other parameters in the waters of the State.

#### *Nonpoint Source Assessment*

This document presents an evaluation of the impacts of nonpoint sources of pollution upon the waters of the State, their magnitude, and origins. This assessment integrates land use factors and water quality factors into a nonpoint source impact statement for each waterbody. The Best Management Practices ("BMPs") recommended for abatement of the various nonpoint problems are listed.

#### *Nonpoint Source Management Plan*

This document describes the procedures to be used to implement the nonpoint source program. The primary goal of the program is to systematically select and treat nonpoint sources of pollution that impair water quality in the State of Ohio. Topics covered in this document are problem identification, project review, interagency coordination, identification of funding sources, evaluation of BMPs and timetables for implementation. The costs involved in the implementation of the BMPs are determined and included in the assessment.

#### *Wasteload Allocations*

The procedures employed for the development of wasteload allocations involve assessment and interpretation of data, compilation of information, evaluation and review of results, and documentation. Information bases utilized in preparing NPDES permits are obtained from a variety of state agencies, federal agencies, and private sources.

### **H. Water Quality Management Plan Certification Procedures**

Like ODA, Ohio EPA announces draft documents and proposed rules as available for public review and comment in newspapers located throughout the State and on the Ohio EPA's website. The public comment period extends for 30-90 days, depending on the nature of the document. The documents will be available for public review at the District Offices of the Ohio EPA. If sufficient public interest is shown to warrant such action, a public hearing will be considered to receive further comment. If a public hearing is deemed appropriate, a notice will be published 45 days in advance.

Comments received by Ohio EPA concerning draft documents or draft rules are responded to in a Responsiveness Summary. The response may take one of three forms: (1) incorporation of the comment into a revision to the document, (2) rejection of the comment, or (3) simple acknowledgment of the comment. A justification will be supplied for each comment response action. The public comments and the agency responses will be kept on record at Ohio EPA and will be supplied to U.S. EPA upon request. The Responsiveness Summary will be submitted with the final document to U.S. EPA.

Upon receipt and review of the certification letter, the final document(s), and the Responsiveness Summaries, U.S. EPA will take official action on the updated information. For updates not fully approved, the U.S. EPA Regional Administrator will inform Ohio EPA, in writing, of those actions which must be taken to obtain full approval. Ohio EPA will then take the necessary steps, making the revisions and additions specified by U.S. EPA, to obtain full approval by the Regional Administrator.

#### **IV. PROCEDURES FOR REQUIRING PERMIT APPLICATIONS AND RENEWAL, FOR NONCOMPLIANCE PROGRAM REPORTING, FOR PROGRAM REVIEW, AND ADMINISTRATIVE AND JUDICIAL REVIEW**

- A. Procedures for Requiring Applications and Renewal Notification
- B. Permit Issuance Procedures
- C. Procedures for Public Notice and Comment
- D. Procedures for Public Hearings
- E. Noncompliance and Program Reporting
- F. Procedures for Updating the State Program
- G. Plans for Periodic Self-Analysis of State Legal Authorities and Program Effectiveness
- H. Administrative and Judicial Review of Permitting Decisions

##### **A. Procedures for Requiring Applications and Renewal Notification**

Applications for new, revised or reissued permits must be filed in accordance with the requirements set forth in Ohio Adm. Code 901:10-1-02. This rule outlines the content, format and timing of information submitted to DLEP in an application for an NPDES permit and identifies who may act as an approved signatory on permit applications and related documents.

Notification letters are sent to unpermitted facilities referred to ODA Legal based on field inspections. Facilities that fail to respond to these notification letters are notified by a second notification letter 30-60 days after the first notification letter. The unpermitted facilities that fail to respond to the second notification letter within 45 days are referred to ODA Legal for enforcement.

DLEP will use ODA's CAFO NPDES Permit Application form. These Permit Application forms may be modified when necessary, subject to EPA approval. Copies of ODA's permit application forms are included in Volume 2 of this application for program revision.

The Permit Issuance Procedures Table below shows the overall permit review procedures for proposed facilities and existing facilities. These permit review procedures will apply to NPDES permits issued by DLEP. Each step in the table is identified by a number and also designates which organizational unit within DLEP will be responsible for each procedural step. A checklist for permit or permit modification issuance is also included in Volume 2 of this application for program revision.

### **B. Permit Issuance Procedures**

<b>Steps</b>	<b>Description</b>	<b>Unit or Individual Responsible</b>
1	A permit application is received and logged into the DLEP database system. A computer file and main office file for the facility is created if one does not exist. Fees are paid. An engineer is assigned and a facility file is created.	Administration, Engineering
2	The application is checked for administrative completeness and accuracy and all errors and omissions are noted.	Administration Engineering
3	If the application is incomplete, a summary of the application deficiencies is listed in a letter or electronic communication to the applicant requesting additional information. The application review is suspended pending receipt of additional information.	Administration Engineering ODA-Legal
4	A copy of the original application is retained on file, in the event of an appeal.	Administration
5	The engineer may visit the site to become aware of any site-specific production and/or treatment that could influence permit limitations or conditions. The engineer corresponds with the applicant regarding the application and whether the application meets the requirements for permit issuance. Based on the comments by the engineer and responses received from the applicant, the permit application may be revised or withdrawn, and/or permit limitations and conditions are developed.	Engineering
6	If an anti-degradation review is required, a public notice of the receipt of the permit application is published and other notices are sent to other State, federal, and local government agencies, in accordance with Ohio Adm. Code Chapter 901:10-6.	Engineering
7	If the application is complete in accordance with Ohio Adm. Code 901:10-1-02(A)(9), then a fact sheet or statement of basis is prepared for the draft permit in accordance with Ohio Adm. Code 901:10-6-05 and	Engineering, Administration

	information meetings/public meetings may be held if significant public interest is demonstrated.	
8	Effluent limitations are calculated for the draft permit.	Engineering
9	Draft permit routed to Division Chief of DLEP for review and comments.	Division Chief
10	Draft permit routed to Director for review and comments.	Division Chief, Director
11	Public notice and fact sheet of draft permit are published; if ODA is already aware of significant public interest in the draft permit or if requested by the applicant or decided at the Director's discretion, a public meeting is scheduled as part of the public notice.	Administration and Engineering
12	Those draft permits for which U.S. EPA has not waived review are mailed to U.S. EPA for review. Draft permits are sent to Ohio EPA Division of Surface Water and the U.S. Army Corps of Engineers. Draft permits are also sent to other government agencies, such as ODNR, the local areawide planning agency, or the U.S. Fish and Wildlife Service, in accordance with the provisions of Ohio Adm. Code Chapter 901:10-6. The draft permit is sent to the applicant or owner or operator, the board of county commissioners, the board of township trustees, the local soil and water conservation district, and local board of health.	Administration
13	A public meeting is held if previously scheduled. If significant public interest is found to exist after issuance of the public notice of the draft permit and a public meeting was not scheduled in that public notice, a second public notice scheduling the public meeting is issued before the public meeting is held. Prior to the public meeting a second public notice is issued announcing the date, time and location of the meeting.	Administration and Engineering
14	The draft permit is ready for issuance and becomes the final permit (a) in the absence of comment, concern, or objection from any applicable federal or State agency and (b) upon resolution of any comment, concern, or objection which would otherwise prohibit issuance under the Clean Water Act or Ohio Rev. Code Chapter 903, including regulations promulgated under their authority. If ODA cannot resolve such comments, concerns, or objections that would prevent issuance of the permit, ODA may withdraw the draft permit or, if ODA continues to disagree with any comment, concern, or objection from the federal or State agency involved, ODA notifies U.S. EPA in writing and transmits a copy of the appropriate permit file to U.S. EPA, at which	Administration, Engineering and ODA-Legal

	time all permit authority transfers to U.S. EPA.	
15	If significant comments are received, a summary of significant comments (including those presented during any public hearing) and a response to comments ("Responsiveness Summary") is prepared.	Administration and Engineering
16	The summary of significant public comments, the response, and the proposed final permit are sent to U.S. EPA for those permits for which U.S. EPA has not waived review in accordance the MOA and for those permits for which U.S. EPA requests or has requested review.	Administration, Engineering and ODA-Legal
17	If significant changes to the draft permit are made in response to comments, those changes are incorporated into a proposed final permit that is prepared and sent to U.S. EPA for review (along with the summary of significant comments and the Responsiveness Summary) and to the applicant.	Engineering
18	When a draft permit has been prepared and sent to U.S. EPA and the applicant, the draft permit may be issued as the final permit (a) in the absence of objection or (b) after resolution of any U.S. EPA objection.	Administration
19	U.S.EPA will notify the State and the applicant of any formal objection to the draft permit. If U.S. EPA objects to the draft permit and ODA agrees with the objection, ODA may issue an amended draft permit or withdraw the draft permit. If the objection cannot be resolved, the State transmits a copy of the appropriate permit file to EPA, at which time all permit authority transfers to U.S. EPA.	Administration and Engineering,
20	ODA finalizes the draft permit and issues it as the final permit after the close of the 30-day public notice period if (a) no comments are received and no hearing is held or (b) no significant comments are received. Any issuance of a final permit is entered into the DLEP database.	Administration
21	Final permit is watermarked, copied and sent to applicant, local soil and water conservation district, local health department, boards of township trustees and county commissioners.	Administration
22	Public notice of final permit is prepared and issued.	Administration

A complete permit application may require the submittal of quantitative and qualitative data for pollutants contained in a facility's effluent. This requirement will apply to those CAFOs that plan for a discharge that is not covered by the effluent limitations required in Ohio Adm. Code Chapter 901:10-3. The effluent must be sampled and analyzed for pollutants listed in the

application form. For every outfall, each applicant may be required to submit data on the following pollutants:

- ◆ oil and grease
- ◆ total suspended solids (TSS)
- ◆ pH
- ◆ biochemical oxygen demand (BOD)
- ◆ chemical oxygen demand (COD)
- ◆ total organic carbon (TOC)
- ◆ ammonia (as N)
- ◆ temperature (both winter and summer)
- ◆ fecal coliform (if believed present or if sanitary waste is or will be discharged)
- ◆ total residual chlorine (TRC) (if chlorine is used)

After the application is submitted to DLEP and is deemed administratively complete, it is subjected to a technical review by DLEP Engineering staff. During the review process, the assigned engineer may request verification of information submitted in the application from the applicant. If the assigned engineer has questions or concerns regarding the laboratory analyses of the facility's effluent, additional scientific or technical evaluations at the outfall may be necessary. Additional details on hydrological information such as drainage routes, flow amounts, flow measurement devices, etc., may also be necessary. In addition, a determination of where the State waters begin may be needed so that sampling can occur at the appropriate location along the outfall. Some technical problems could occur which would require verifying, for example, the presence of a pollutant in the effluent that is not listed in the permit application. The applicant must conduct any requested tests and submit any additional information on the composition of the effluent requested by the assigned engineer. Once all additional information is submitted for evaluation, the assigned engineer can complete the technical review and proceed with writing a permit for the facility.

Discharge permit limits are determined by compliance with the Ohio Water Quality Standards to assure compliance with such standards in a receiving waterbody. Technology-based limits are imposed per the promulgated State and/or federal guidelines, or in the absence of promulgated guidelines, the limits are based on best professional judgment.

Various mechanisms are used for developing monitoring requirements in discharge permits such as field inspections and reports, compliance history, public comments and complaints, a review of Annual Reports, and Compliance Orders. Best management practices to control or abate the discharge of pollutants shall be included in permits when: (1) authorized under section 304(e) of the Act for the control of toxic pollutants and hazardous substances from ancillary industrial activities; (2) numeric effluent limitations are infeasible, or (3) the practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the Clean Water Act.

DLEP will prepare fact sheets for draft NPDES permits. The purpose of the fact sheet is to provide a brief and concise compilation of information pertaining to the facility, its operation, and



the basis for any permit effluent limitations and other permit conditions. All fact sheets related to draft NPDES permits will contain the information required in Ohio Adm. Code 901:10-6-05.

**C. Procedures for Public Notice and Comment**

Ohio Revised Code § 903.09 and Ohio Adm. Code Chapter 901:10-6 provide for public notice of the public comment period by advertisement in local newspapers as specified by rule, and to persons on a mailing list maintained by DLEP. The notice states anyone may request a hearing (referred to as a “public meeting” under Ohio Rev. Code § 903.09 and the corresponding ODA rules in Ohio Adm. Code 901:10-6). The public comment period extends for at least 30 days from the date of publication of the public notice.

If a hearing is scheduled by ODA, a public notice is made in accordance with Ohio Adm. Code 901:10-6-02. The public comment period then extends at least through the date of any public hearing. The required information to be public noticed is provided in Ohio Adm. Code 901:10-6-02.

**D. Procedures for Public Hearings**

Public hearings (referred to as “public meetings” under Ohio Rev. Code § 903.09 and the corresponding ODA rules in Ohio Adm. Code 901:10-6-04) are conducted by ODA for the purpose of receiving oral and written comments. ODA holds public hearings if there is significant public interest, in accordance with Ohio Adm. Code 901:10-6-04. ODA may also elect to hold a public hearing in other circumstances at the Director’s discretion. *See* Ohio Adm. Code 901:10-6-01(D).

At least thirty days prior to the hearing, notice of the hearing is made in accordance with the procedures contained in Ohio Adm. Code 901:10-6-04. The notice states the date, time, location, and purpose of the hearing and issues applicable to the permit application.

In accordance with Ohio Adm. Code 901:10-6-04, a response to comments (“Responsiveness Summary”) is prepared for all significant comments made during the public comment period or public hearing, and becomes part of the public record on the permit application in question. Hearings are held in the area where the proposed facility will be located, and all proceedings at such hearings are recorded.

**E. Noncompliance and Program Reporting**

ODA will submit all reports as required under 40 C.F.R. § 123.45. More specifically, ODA will comply with U.S. EPA’s Significant Noncompliance Policy (“SNC”) for CWA Violations Associated with CSOs, SSOs, and CAFOs, and Storm Water Point Sources in the Wet Weather SNC Policy. ODA’s data management system will be developed to correlate to periodic reporting required by the Wet Weather SNC Policy.

**F. Procedures for Updating the State Program**

ODA will revise any State rule affected by changes to the federal regulations, which are necessary for the administration of the program according to the procedures set forth in the

Memorandum of Agreement, August 12, 2002. Authority to propose any necessary changes to ODA rules are found in Ohio Rev. Code Chapters 903 and 119.

The Memorandum of Agreement provides specific mechanisms for ODA to receive timely information which will alert the department to the need to revise the State program to meet and comply with revisions to the federal program.

U.S. EPA's notice to ODA of changes in the federal program, and an independent review by ODA staff of the Federal Register and other publications in which changes in the federal program are published, should ensure that the federal program changes are incorporated into the State program as soon as possible.

Under current State procedures, it takes approximately six months to promulgate a new rule or regulation under Ohio Rev. Code § 119.03, although emergency rule-making procedures do exist. A rule promulgated by regular procedures cannot take effect until at least 10 days following final adoption by the Director.

Changes in the State program which do not require regulatory or statutory changes can be addressed, perhaps after a meeting scheduled in accordance with the Memorandum of Agreement, in less than six months, and probably within sixty to ninety days of the notice to ODA.

**G. Plans for Periodic Self-Analysis of State Legal Authorities and Program Effectiveness**

The State will assign an individual to review all State regulations that form part of the State program in a procedure similar to the triennial water quality standards review. The receipt of federal statutory and regulatory changes forwarded by EPA in accordance with the MOA will facilitate the early discovery of State legal authorities that need revision.

Program effectiveness will be assessed in accordance with the continuous improvement goal of total quality management, which has been implemented at ODA, and included in strategic planning and continuing planning process agendas.

Authority to implement the review procedures and to propose any necessary statutory or regulatory changes is also provided by Ohio Rev. Code § 119.032.

ODA's primary responsibility for the NPDES program includes the commitment to develop and maintain, to the maximum extent possible, the legal authority (including State regulations) and the resources required to carry out all aspects of the NPDES program to administer NPDES individual permits, general permits, and construction and industrial stormwater permits for concentrated animal feeding operations, and construction and industrial stormwater permits for animal feeding operations. In addition, ODA must maintain program effectiveness by conducting a comprehensive evaluation and assessment of compliance with schedules, effluent limitations and other conditions in permits.

Meetings between ODA and U.S. EPA are to be scheduled at reasonable intervals to review specific operating procedures, resolve problems, or discuss material concerns involving the



administration of the NPDES permit program. In addition, U.S. EPA will provide to the ODA technical and other assistance on permit matters as requested and on a continuing basis. This assistance could include review of proposed regulatory and statutory changes, whether drafted in reaction to State or federal legislative or judicial initiative.

ODA will immediately notify the U.S. EPA Regional Administrator by telephone, or otherwise, of any situation posing a substantial endangerment to health, welfare, or the environment resulting from the actual or threatened direct or indirect discharge of pollutants into waters of the State.

Similarly, ODA will immediately notify the U.S. EPA Regional Administrator by telephone or otherwise of any significant administrative or judicial decision that could affect the legal authority of the program.

#### **H. Administrative and Judicial Review of Permitting Decisions**

Pursuant to Ohio Rev. Code §§ 3745.04 to 3745.06 and Ohio Rev. Code Chapter 903, NPDES permitting decisions by the Director are subject to the supervisory jurisdiction of an independent State administrative agency, the Environmental Review Appeals Commission ("ERAC"), and to further review by Ohio's Tenth District Court of Appeals of Franklin County. The Ohio Supreme Court may also review any decision by the Court of Appeals where the particular facts of the case fall within the scope of the Supreme Court's jurisdiction in Article IV, Section 2(B) of the Ohio Constitution.

Prior to issuing or modifying an NPDES permit, the Director of ODA shall issue a draft permit. Notice of the issuance of the draft permit will be mailed to the applicant and published in the newspaper of general circulation in the county where the proposed facility or discharge will be located. A permit is effective upon signature by the Director of ODA and issuance by the Director. Notice of the issuance of a final permit must be published to comply with public participation requirements. Ohio Rev. Code § 903.09(D) provides as follows:

The director or the director's representative shall publish notice of the issuance of a final permit to install, permit to operate, or NPDES permit once in a newspaper of general circulation in the county in which the concentrated animal feeding facility or discharger is located.

The Director's issuance of an NPDES permit is appealable to ERAC pursuant to Ohio Rev. Code §§ 903.09 and 3745.04. The jurisdiction of ERAC over legal challenges to permits issued by the Director is set forth in Ohio Rev. Code § 3745.04 which provide, in pertinent part, as follows:

As used in this section, "action" or "act" includes the adoption, modification, or repeal of a rule or standard, the issuance, modification, or revocation of any lawful order other than an emergency order, and the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate, or the approval or disapproval of plans and specifications pursuant to law or rules adopted thereunder.

Any person who was a party to a proceeding before the director of environmental protection may participate in an appeal to the environmental review appeals commission for an order vacating or modifying the action of the director or a local board of health, or ordering the director or board of health to perform an act. The environmental review appeals commission has exclusive original jurisdiction over any matter that may, under this section, be brought before it.

\* \* \*

The appeal shall be in writing and shall set forth the action complained of and the grounds upon which the appeal is based.

The appeal shall be filed with the commission within thirty days after notice of the action. Notice of the filing of the appeal shall be filed with the appellee within three days after the appeal is filed with the commission.

The appeal shall be accompanied by a filing fee of seventy dollars, which the commission, in its discretion, may reduce if by affidavit the appellant demonstrates that payment of the full amount of the fee would cause extreme hardship.

Within seven days after receipt of the notice of appeal, the director or local board of health shall prepare and certify to the commission a record of the proceedings out of which the appeal arises, including all documents and correspondence, and a transcript of all testimony.

\* \* \*

The filing of an appeal does not automatically suspend or stay execution of the action appealed from. Upon application by the appellant, the commission may suspend or stay the execution pending immediate determination of the appeal without interruption by continuances, other than for unavoidable circumstances.

As used in this section and sections 3745.05 and 3745.06 of the Revised Code, "director of environmental protection" and "director" are deemed to include the director of agriculture and "environmental protection agency" is deemed to include the department of agriculture with respect to actions that are appealable to the commission under Chapter 903. of the Revised Code.

Conversely, if the Director proposes to modify, deny or revoke an NPDES permit, then the statute describes different procedures, allowing for an adjudication hearing before the ODA on the proposed adverse action prior to a final action being issued by the Director. The Director's final action issued after the adjudication hearing is then appealable to ERAC. As stated in Ohio Rev. Code § 903.09(F):

The director shall mail to the applicant or the permittee notice of the Director's proposed action to deny, suspend, or revoke a permit to install, permit to operate, or NPDES permit.

\* \* \*

The director shall not issue an order that makes the proposed action final until the applicant or permittee has had an opportunity for an adjudication hearing in accordance with Chapter 119. of the Revised Code, except that section 119.12 of the Revised Code does not apply. An order of the director that finalizes the proposed action or an order issuing a permit without a prior proposed action may be appealed to the environmental review appeals commission under sections 3745.04 to 3745.06 of the Revised Code.<sup>10</sup>

More specifically, for NPDES permits, Ohio Rev. Code § 903.08(L) provides as follows:

The director may modify, suspend, or revoke a NPDES permit issued under this section for cause as established by rule. No NPDES permit issued under this section shall be modified, suspended, or revoked without a written order stating the findings that led to the modification, suspension, or revocation. In addition, the permittee has a right to an administrative hearing in accordance with Chapter 119. of the Revised Code, except that section 119.12 of the Revised Code does not apply. Further, an order of the director modifying, suspending, or revoking a NPDES permit may be appealed to the environmental review appeals commission under sections 3745.04 to 3745.06 of the Revised Code.

In accordance with Ohio Rev. Code Chapter 119, adjudication hearings are held before an administrative law judge or "hearing officer." ODA adjudication hearings are governed by the procedural rules and case law of Ohio Rev. Code §§ 119.09 and 119.10. The adjudication hearing process may take approximately 6 months from initial status conference to hearing, although the time period may be longer or shorter, depending on factors such as whether settlement negotiations lead to continuances or delays or the parties request less preparation time and the soonest available hearing date.

Thirty to sixty days after the hearing, and following preparation of a transcript and consideration of post-hearing briefs, the hearing officer issues a written report and recommendation to the Director regarding the proposed action. Pursuant to Ohio Rev. Code § 119.09, the Director may approve, modify, or disapprove the recommendation when issuing a final action on the permit. The Director's decision is a "final decision or order of the Director" and reviewable at ERAC.

In addition to the appeal rights given to permittees, other affected persons are also afforded an opportunity to challenge the final order of the Director through an appeal to ERAC, pursuant to Ohio Rev. Code §§ 3745.04 to 3745.06.

ERAC conducts a *de novo* hearing, considering testimony and evidence from all parties, in appeals where no adjudication hearing was held before the Director. For cases where an adjudication hearing was conducted by the Director in accordance with Ohio Rev. Code §§ 119.09 and 119.10, ERAC conducts a hearing based on the record from the adjudication hearing. Ohio Rev. Code § 3745.05 provides:

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<sup>10</sup> Just as the public is notified of the Director's action to issue a final effective permit, Ohio Rev. Code § 903.09(F) requires public notice of permit decisions that are adverse to the permittee or applicant which involves a proposed denial, modification, suspension, or revocation of a NPDES without the applicant's or permittee's consent.

In hearing the appeal, if an adjudication hearing was conducted by the director of environmental protection<sup>11</sup> in accordance with sections 119.09 and 119.10 of the Revised Code,\* \* \* the environmental review appeals commission is confined to the record as certified to it by the director. The commission may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the director. If no adjudication hearing was conducted in accordance with sections 119.09 and 119.10 of the Revised Code, the commission shall conduct a hearing *de novo* on the appeal.

For the purpose of conducting a *de novo* hearing, or where the commission has granted a request for the admission of additional evidence, the commission may require the attendance of witnesses and the production of written or printed materials.

Any party to an ERAC appeal of an NPDES permit may appeal the ERAC's decision to the Tenth District Court of Appeals of Franklin County. Ohio Rev. Code § 3745.06 states:

Any party adversely affected by an order of the environmental review appeals commission may appeal to the court of appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred.

Depending on the issues raised in the appeal, the Ohio Supreme Court may also review the Court of Appeals' decision. Pursuant to Article IV, Section 2(B) of the Ohio Constitution, the Ohio Supreme Court possesses jurisdiction to review decisions by the Court of Appeals, although in many instances this exercise of jurisdiction is discretionary. The Ohio Supreme Court is most likely to consider an appeal where the case is of public or great general interest or raises a substantial constitutional question under either the Ohio or United States Constitution. See Ohio Const. Art. IV, § 2(B)(2)(a)(i), 2(B)(2)(e).

## **V. COMPLIANCE AND ENFORCEMENT PROGRAM**

### **A. Inspections**

1. Annual Schedule of Inspections
2. Inspection Categories
3. Inspection Quarters
4. Inspection Procedures

### **B. Complaints**

1. Intake
2. Assignments
3. Report

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<sup>11</sup> As previously noted in the quotation from Ohio Rev. Code § 3745.04 above, Ohio Rev. Code § 3745.04(E) states that the term "director of environmental protection" as used in Ohio Rev. Code §§ 3745.04 to 3745.06 includes the director of agriculture with respect to actions that are appealable to the commission under Ohio Rev. Code Chapter 903.

- 4. Completion
- C. Enforcement Referrals
  - 1. No Action
  - 2. Violations
  - 3. Formal Documentation
- D. Enforcement Documents
  - 1. Warning Letter
  - 2. Notice of Deficiency Resulting in Noncompliance and Notice of Violation
  - 3. Notice of Hearing
  - 4. Final Orders of the Director
  - 5. Attorney General Referrals
- E. Enforcement Tracking and Activities
  - 1. Data Management
  - 2. Data Entry
  - 3. Other Activities
- F. Citizen Suits

This Part provides general information about enforcement procedures of the ODA-DLEP. The procedures described herein are guidelines only and exceptional cases may warrant actions other than those specified in this document. Enforcement documents issued by DLEP from August 19, 2002 through November 30, 2006 under the State permit enforcement program were included in Volume 3 of this NPDES program revision application.

#### A. Inspections

Inspectors, who may also be assisted by engineering staff, conduct compliance inspections. Inspections are conducted in accordance with the DLEP Routine Inspection Form, Revised February 2013. In general, inspectors perform biannual (twice per year) inspections of most facilities to monitor compliance with applicable federal and State requirements. When an owner or operator of a facility is found to be out of compliance with applicable State and federal requirements, inspectors conduct follow-up inspections in addition to the biannual inspections as necessary to ensure acts of noncompliance are quickly addressed by the facility. Additional personnel hours are dedicated to the investigation of written and oral citizen complaints (*see* Ohio Adm. Code 901:10-5-01), unregulated facilities, and spill response investigations reported to DLEP.

There are three (3) DLEP Inspectors that conduct permit inspections, spill and complaint inspections, and ambient monitoring and sampling activities throughout Ohio. The estimated employee workday amounts for each type of inspection or monitoring activity, based on average inspection amounts and workload quantity for the last two years, is as followed:

- 1. Citizen Complaints - 1 workday x 50 complaints = 50 workdays.
- 2. Spills - 3 workdays x 20 reported spills = 60 workdays
- 3. Activities at Unpermitted Facilities - 60 workdays

4. Permitted Facility Inspections – 1.5 workdays x 350 facility inspections = 525 workdays
5. Monitoring and Sampling Activities (not otherwise included in any complaints, spills or inspections listed above) - 60 workdays
6. Area Surveillance, Training and Continuing Education, Equipment Maintenance, Etc. - 120 workdays

**Total** = 875 workdays for DLEP Inspectors

The three (3) DLEP inspectors complete a majority of the work listed above. These three inspectors can provide a total of 900 workdays a year. In addition, the engineering staff is available in the case an emergency arises and no inspector is available. Ohio Rev. Code § 903.12 authorizes DLEP Inspectors to enter public or private property to make investigations and inspections as necessary for the administration and enforcement of the program. In conducting such inspections, DLEP Inspectors follow the biosecurity procedures set forth in Volume 2 of this application for program revision. Some examples of inspection letters have also been included in Volume 2 under the tab labeled “Inspection Letters.”

#### 1. Annual Schedule of Inspections

Approximately sixty (60) days before the end of the calendar year, the DLEP Inspectors plan a schedule for inspections for the following year and generally organize per each quarter of the year. Each Inspector plans routine inspections at each permitted facility, with most facilities with liquid manure being inspected twice per year, as well as Major CAFF's. Facilities without prior compliance issues or with a solid manure system are generally only inspected once per year. Inspections require the completion of the entire DLEP Routine Inspection Form.

#### **Number of Inspections Conducted**

	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2014</b>	<b>TOTAL</b>
<b>Complete</b>	257	306	317	337	348	339	341	293	320	2,858
<b>Partial</b>	44	57	56	16	19	29	18	10	9	258
<b>TOTAL</b>	301	363	373	353	367	368	359	303	329	3,116

#### 2. Inspection Categories

Each year the Executive Director evaluates the total number of inspections performed during the prior year. This evaluation includes the number of complaints filed and the number of complaint inspections performed. Based on the evaluation of the work conducted in the prior year, time for the following types or categories of inspection is planned in the subsequent year's draft schedule of inspections:



a. Complaint inspections<sup>12</sup>. Refer to Section B below.

b. Construction inspections. It is the responsibility of the DLEP engineering staff to inspect facilities during construction to ensure compliance with the terms of State PTIs. Additionally, facilities that have been issued State PTIs are required to hire professional engineering consulting services to provide quality control documentation during critical stages of the construction of most manure storage or treatment facilities. The DLEP Inspectors may also do these inspections, under the guidance of the engineers, or join the engineers on construction inspections. Engineers perform final construction inspections and will issue written authorization to stock animals prior to commencement of operations in the NPDES permit. Construction inspections are important to ensure that a facility is properly built to meet the limitations imposed in its NPDES permit and State PTO once stocking occurs.

c. Enforcement case inspections. These are follow-up inspections used to verify information pertaining to facilities subject to enforcement.

d. Follow-Up and Limited inspections. Unannounced inspections that are limited to only one or two issues of concern, e.g., a follow-up inspection to assure that an issue found during a routine inspection has been resolved; a check on operating records and freeboard; and an evaluation of a facility's capacity to avoid winter application of manure. If spill reports, complaints, or unusual events indicate problem areas, more frequent inspections will be made and may include sampling inspections, unannounced visits, and inspections focused on discrete areas of the facility.

e. Biannual inspections. These are the two routine, complete inspections conducted for each permitted facility, as identified in Section (A)(1) above.

### 3. Inspection Tracking

Enforcement actions are tracked through the DLEP's database in the functional specification called "Enforcement." Data entry helps to ensure compliance and serves as a tracking mechanism for all inspectors, engineers, Program Administrator, ODA-Legal, and the Division Chief to rely upon in preparing for subsequent inspections, enforcement actions, and administrative hearings. [Both formal and informal methods of communications also exist between the various Divisions within the ODA (e.g., Animal Health, Enforcement, and Dairy); as well as other State, federal, and county offices to ensure communication in case resolution.]

### 4. Inspection Procedures

Copies of past inspections, current permits, compliance schedules, enforcement actions, discharge reports, annual reports, and like documents are maintained at the main office of the ODA DLEP or in the DLEP database. DLEP Inspectors are able to access most of this information off site via computer from software files maintained by the Program. For routine inspections, DLEP Inspectors have a calendar or schedule of anticipated inspections and review past inspections and

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<sup>12</sup> Ohio Rev. Code §§ 903.12 and 903.14 use the term "investigation" whereas Ohio Rev. Code §§ 903.16 and 903.17 use the term "inspection." For convenience, the term "inspection" is used here to refer to both types of activities under the named statutes.

records prior to their inspections. This includes a review of the most recent inspection and any previous violations cited that will require re-assessment for a “return to compliance.” The DLEP Inspectors will check to see if a schedule of compliance for the operation was met as required by any legal document such as a Warning Letter, Notice of Deficiencies, Notice of Violation, NPDES permit, or administrative or judicial order. Assessing dates and compliance schedules is required to determine whether a violation has taken place and the number of days of violation in order to compute any recommended penalty and sanction.

All inspections are reported on the DLEP Routine Inspection Form, Revised February 2013. Biannual inspections require that the entire form be completed. The inspection form completed at the end of the inspection is preliminary and may be handwritten. DLEP Inspectors will provide a clean, typed copy of the inspection report for the owner or operator and for DLEP files. The typed inspection report is reviewed by the DLEP Environmental Engineer Supervisor and by the Division Chief. The reports, and any associated enforcement documents as a result of the inspection, are also reviewed by ODA-Legal if enforcement action is warranted. After the routed documents are reviewed by DLEP staff, they are returned to the respective inspector for revision and finalization. The final, approved report has a cover letter from the DLEP Inspector with any explanations needed, recommended practices, violations observed, and required actions. The date that the final version of the inspection report is sent to the facility is the date entered in the DLEP database by the Program Administrator. The final inspection report including the cover letter is stored in the DLEP database and thus is readily available electronically.

## **B. Complaints**

Aggrieved persons may file complaints either orally or in writing. Pursuant to Ohio Rev. Code § 903.15, the appropriate DLEP Inspector shall investigate those written complaints that are signed and dated. The ODA has discretion as to whether to investigate oral complaints. The complaint procedure used by DLEP is described in Ohio Adm. Code rule 901:10-5-01. The complaint procedure endeavors to elicit information from an oral complainant that will provide the facility address, a description of the nature of the complaint, and the name and address of the complainant so that the complainant may be notified of the outcome of the investigation.

The following table gives a summary of complaints received and responded to by DLEP from January 1, 2007 through December 31, 2013.

Table of Complaints

	<b>Total</b>	<b>Flies</b>	<b>Health Concern</b>	<b>Manure Application</b>	<b>Manure Discharge</b>	<b>Manure Other</b>	<b>Odor</b>	<b>Other</b>
2007	61	17	0	17	4	9	3	8
2008	49	9	0	4	3	5	18	4
2009	30	1	0	9	2	1	12	2
2010	16	2	0	4	0	0	2	1
2011	20	6	0	12	2	0	0	0
2012	18	4	0	10	2	0	2	2
2013	14	2	0	7	2	1		0

## 1. Intake

DLEP Inspectors are responsible for the investigation of reported spill incidents and citizens' complaints. DLEP Inspectors are available for such activities within a twenty-four hour period after notice. As evidenced by the MOA with Ohio EPA and the MOA including ODNR-DSWC, Ohio EPA, and ODA, the Departments routinely share information by telephone and electronically to expedite the response time from the nearest available person to an emergency if such an event occurs. Complaints and non-emergency chemical spills can be phoned in to the ODA via the 24-hour hotline, or to the main office number for DLEP. In addition to the ODA's 24-hour hotline, the ODA also receives and responds to emergency releases, which are reported to the Ohio EPA Emergency Response Hotline. Permit and/or enforcement actions are requested as appropriate following these investigations.

Any DLEP staff person may receive a complaint (oral or written) and the staff person that receives the complaint is responsible for completing a Complaint Intake Form. Any staff person completing the Complaint Intake Form must be sure to record the name of the person making the complaint (if provided), his/her phone number, and the location of the problem in order to investigate and follow-up on the complaint. The Program Administrator enters information from each Complaint Intake Form into the DLEP database.

## 2. Assignments

The DLEP staff member who received the complaint forwards the Complaint Intake Form to the appropriate inspector and DLEP Engineer Supervisor or Division Chief for assignment. The assigned DLEP Inspector may also receive a telephone call from a DLEP staff person to alert him/her and to brief him/her about the complaint.

If the DLEP Inspector cannot respond to the complaint in a timely manner, he/she will contact the DLEP Engineer Supervisor or the Division Chief immediately and ask that another staff member be sent. If the DLEP inspector needs to seek direction on the follow-up, the Inspector will contact the DLEP Engineer Supervisor or the Division Chief immediately for clarification on the complaint. If the DLEP Engineer Supervisor or the Division Chief is not available, the inspector will contact another staff engineer and ask that one of the engineers take on the complaint.

The DLEP Inspector investigates the complaint within 10 days of receipt of the assignment and generally contact is made with the complainant and any facility identified in the complaint within 1 business day. Depending on the nature of the complaint, the Inspector may contact the DLEP Engineer Supervisor, Division Chief, or ODA-Legal (e.g., regarding right of entry) from the field for guidance or to update them on pertinent facts. If additional actions are needed, these actions should be taken. Written notes of these actions and conversations are included in the Complaint Follow-Up Report.

## 3. Report

After completing the complaint investigation at the facility, the DLEP Inspector drafts a Complaint Follow-Up Report that includes his/her observations; a description of problems/violations observed, if any; follow-up actions to be taken by the facility; whether this complaint is for a permitted or non-permitted farm; and the complete address and phone number of

the complainant, if provided. The draft report is generally completed within 20 business days. If additional information is acquired about the complaint before the report is sent out, that information is added to the report and routed as described below. If additional information on the same complaint comes in after the report is sent out, then an addendum to the initial complaint report is drafted and also routed as described below.

When the draft Complaint Follow-Up Report is complete, the DLEP Inspector e-mails the report, and a cover letter to the DLEP Engineer Supervisor. The Engineer Supervisor completes the initial review of these documents and forwards the documents to ODA-Legal if enforcement action is required as a result of the investigation. Once reviewed by Legal, or if no enforcement action is necessary, the report is forwarded to the Division Chief for review. The Division Chief returns the revised documents to the DLEP Engineer Supervisor and then all documents are returned to the assigned DLEP Inspector for finalization.

#### 4. Completion

- a. The DLEP Inspector finalizes the Complaint Follow-Up Report, cover letter and enforcement documents based on the DLEP's office staff review described above.
- b. If the complaint is a written complaint, the DLEP Inspector's cover letter is signed by the Director and states that an inspection was completed and the report is attached with the inspection's conclusion. The letter for the Director is included as part of the Complaint Follow-Up Report and is part of the review process described above. If the complaint is not written, then the inspector signs the cover letter. Once the report, cover letter and any enforcement document are finalized with revisions, the inspector returns the documents to the Program Administrator for mailing to the appropriate parties and enters the documents into the DLEP database.
- c. The Program Administrator attaches the final copy of the Complaint Follow-Up Report, a copy of the complaint intake form, and any other documentation associated with the complaint investigation in the DLEP database and enters either "no action" if no enforcement is required or "see enforcement" if enforcement is required. If enforcement is selected, the complaint is logged into the DLEP database for enforcement tracking under "Enforcement."

#### C. Enforcement

Enforcement is used to ensure compliance with permits and federal and State environmental laws and regulations. Enforcement options include (1) a letter from the DLEP Inspector noting the violation and directing that corrective action be taken by a set date; (2) a Warning Letter issued by the Division Chief; (3) Complaint Follow-Up Reports and correspondence for the Director's signature (for written complaints)<sup>13</sup>; (4) administrative enforcement under Ohio Rev. Code §§ 903.09 (permit revocation), 903.16 (violations under the State permit program) and 903.17 (for

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<sup>13</sup> Ohio Rev. Code § 903.15(B) requires the Director to investigate a written, signed, and dated complaint. An oral complaint may be investigated. Upon completion of the investigation, the Director may either dismiss the complaint and notify the complainant or proceed in accordance with Ohio Rev. Code § 903.17. While the Director must respond in writing to written complaints, he has discretion to also respond in writing to oral complaints.

NPDES violations), including Notices of Deficiencies Resulting in Noncompliance, Notices of Violation, and administrative orders (sometimes called Notices of Hearing) issued with penalty or without penalty; (5) referral to the Office of the Attorney General for civil or criminal enforcement under Ohio Rev. Code §§ 903.16, 903.17, 903.30, and 903.99; and (6) Emergency Orders under Ohio Rev. Code § 903.18. Enforcement options are discussed in detail in Section D, Enforcement Documents, below. The particular enforcement option used will depend on the nature, frequency, and severity of the violation, and whether the owner or operator is unable or unwilling to return to compliance.

Enforcement actions are generated by inspections, complaint investigations, follow-up complaint inspections, reviews of construction sites and construction activities, reviews of documents (e.g., failure to renew permits, or DLEP's review of annual reports), and reviews of self-monitoring data in a facility's Operating Record. Generally, all enforcement is discussed among DLEP staff members, including the DLEP Inspector, Engineer Supervisor, Division Chief, ODA-Legal, and the Assistant Attorney General assigned to represent DLEP in enforcement actions. These discussions occur via staff meetings, teleconferences, or e-mail communications.

After review and discussion amongst staff, the appropriate enforcement response is determined. If enforcement action is required, the appropriate enforcement document is generated by either the DLEP Inspector or Engineer and routed for review. The Program Administrator enters the facility into the DLEP database for "Enforcement" and subsequent case management. In addition, the DLEP staff may decide after their discussions that additional information or investigation is needed before an enforcement determination is made and assignments made to the appropriate DLEP employees. This may include additional fieldwork, technical work, or legal analysis to determine if sufficient evidence exists to proceed with an enforcement action.

In situations where immediate action is required to protect the public health or safety or the environment, emergency enforcement action can be taken to address the situation without waiting for the completion of the standard enforcement review process. Such an action may include the issuance of an emergency order under Ohio Rev. Code § 903.18 or a request for a temporary restraining order in Ohio's common pleas courts through a referral to the Ohio Attorney General's Office pursuant to Ohio Rev. Code § 903.17. In an emergency, the Director can also use funds in the "Livestock Management Fund," created by Ohio Rev. Code § 903.19, to take corrective actions. Any such costs incurred by the Director may be recovered from responsible persons through Director's Final Orders or by the Office of the Attorney General, acting upon request of the Director, in a judicial enforcement action.

A workload analysis of the anticipated number of enforcement actions the ODA will prepare over the next two years is difficult to project. The number of enforcement actions issued is based on the number of referrals from DLEP Inspectors, the Ohio Department of Natural Resources Division of Soil and Water Resources, the 88 local county SWCD offices, Ohio EPA, and citizens' complaints, as well as those generated by file reviews. Moreover, changes to the NPDES program's scope through the *Waterkeeper* and *National Pork Producers* decisions have made projection difficult.



Currently there are 3 DLEP Inspectors and 3 DLEP Engineers that prepare enforcement actions. The following table summarizes enforcement actions taken under the State permitting program during the past seven years.

Enforcement Actions Taken Against Facilities  
January 1, 2005 through December 31, 2013

Year	Warning Letter	Notice of Deficiency	Notice of Hearing	Emergency Order	Consent Agreement	Permit Revocation	Attorney General Referral	TOTAL
2005	12	31	3	1	1	1	0	48
2006	10	20	4	0	0	0	1	35
2007	19	14	2	0	2	0	6	43
2008	25	2	1	0	1	0	0	29
2009	15	10	1	0	0	0	1	27
2010	9	3	0	0	0	0	0	12
2011	16	8	0	4	0	0	0	28
2012	7	7	0	0	4	0	0	18
2013	14	13	0	0	0	0	0	27
Total	127	108	11	5	7	1	8	267

Excluding Warning Letters and permit revocation orders, ODA estimates that approximately 30 enforcement actions will be issued against facilities over the next two years. This estimate includes both State permitting enforcement and an estimate of NPDES enforcement. As is evident from the above chart, however, the amount of enforcement activity can vary considerably by year because enforcement activity is necessarily dependent on the type and level of noncompliance seen during inspection activity.

1. No Action

Should relatively minor violations be discovered during routine inspections or other inspections, and the permittee shows willingness and ability to correct the problem, formal enforcement action is usually not taken. However, the owner or operator is informed of all violations observed in the final inspection report and in the report's cover letter. The owner or operator will also be informed in the cover letter of actions the owner or operator must take to return to compliance before the next bi-annual inspection or before a more immediate follow-up inspection.

The results of complaint investigations that reveal no violations are entered into the DLEP database as "No Action" or "NA." The results of complaint investigations are provided to the complainant if the complainant has provided contact information. In the case of complaints, the owner or operator and the complainant (if known) will be informed in the final Complaint Follow-Up Report of violations and of those actions the owner or operator must take to return to compliance. Finally, if the complainant submitted a written complaint, a letter summarizing the results of the investigation will be issued to the complainant with the Director's signature. Any relatively minor violations that are not corrected through this process by the time of the next inspection become subject to escalated enforcement.



## 2. Violations

Inspections. Violations found during routine inspections are noted in the final inspection report and in the cover letter. In addition, the inspection report and the cover letter describe the corrective actions necessary to return to compliance. Depending on the nature or degree of seriousness or gravity of the violation, a Warning Letter may be issued, administrative or judicial enforcement may be commenced, or an emergency order under Ohio Rev. Code § 903.18 may be issued. In the alternative, for minor violations, the DLEP Inspector may direct the owner or operator of the facility to return to compliance before the next regularly scheduled biannual inspection or a more immediate follow-up inspection. If the subsequent inspection shows that the violation revealed in the previous inspection is still not resolved, the DLEP Inspector proceeds to escalate enforcement as discussed in *Unresolved, repeated, or serious violations*, below. Enforcement options are discussed in detail in Section D, Enforcement Documents.

Complaints. Complaint investigations that reveal violations are noted in the Complaint Follow-Up Report. The Complaint Follow-Up Report also describes the corrective actions necessary to return to compliance before a complaint follow-up inspection is performed. Depending on the nature or degree of seriousness or gravity of the violation, a Warning Letter may also be issued or other enforcement commenced in accordance with Ohio Rev. Code §§ 903.17 and 903.18. If the subsequent follow-up inspection shows that the violation revealed in the previous investigation is still not resolved, DLEP proceeds to seek escalated enforcement as discussed in *Unresolved, repeated, or serious violations*, below. Finally, if the Complaint is a written complaint, a letter summarizing the results of the investigation will be issued to the complainant with the Director's signature.

Unresolved, repeated, or serious violations. If the violation is not resolved within the time frame mandated by DLEP in its initial enforcement response, if the violation is frequent or serious, or if the facility indicates an inability or unwillingness to return to compliance, appropriate escalated enforcement action is taken. [See detailed discussion of Enforcement Documents in section D below.] The type of escalated enforcement to be taken is determined by evaluating the violations involved and through discussion between the DLEP Inspector who identified the violations, other DLEP staff, ODA-Legal, and the Division Chief.

Enforcement Resulting from Surface Application of Manure on Frozen or Snow-Covered Ground: Discharges, Corrective Actions, and Prohibitions. Enforcement procedures will vary for violations related to manure application on frozen or snow-covered ground because the facility is required to obtain prior approval from the Director or his/her authorized representative before any surface application of manure during this period. Additional restrictions and setbacks are also imposed for winter application on frozen or snow-covered ground, as stated in Ohio Adm. Code 901:10-2-14(G) and 901:10-2-14, Appendix A, Table 2. DLEP staff will visit the site prior to application and will attempt to be present at the site during the application event. In addition, if the land-applied manure discharges to waters of the State, then the facility is required to notify DLEP as soon as possible or within two hours of detection of the runoff event. In any event, a discharge must be reported within 24 hours following first knowledge of the discharge. Actions must be taken to contain or manage the spill. Other requirements for emergency response are stated in Ohio Adm. Code 901:10-2-17 and in any NPDES permit approved and issued by the Director.

A discharge of manure to waters of the State from land application on frozen or snow-covered ground that is not the result of a precipitation event is prohibited. As required by Ohio Adm. Code 901:10-2-14(C)(6), weather conditions must be checked and recorded 24 hours before and after application as well as during application to avoid precipitation-related runoff.

In the event that a facility fails to comply with the land application requirements for frozen or snow-covered ground including, but not limited to, prior notice to ODA of intended surface application, notification of discharges, monitoring and record-keeping requirements, then ODA will not follow an administrative enforcement progression from Warning Letter to Notice of Deficiencies and Notice of Violation but will assume that the noncompliance must be referred to the Attorney General's Office for judicial enforcement pursuant to Ohio Rev. Code § 903.17(D). Refer to Enforcement Documents in section D.5 (Attorney General Referral) below.

An enforcement action taken by ODA-DLEP through the Office of the Attorney General will require the facility to take corrective actions. The nature of corrective actions required will depend on the time and circumstances of the noncompliance, including, but not limited to, cleaning and pumping manure for correct application or disposal; maintaining dams to block manure discharges; using or maintaining tile plugs; sampling; and additional reports to supplement emergency reporting, e.g., progress reports on cleanup. In addition, ODA will develop a penalty assessment and recommend this to the Attorney General with the case referral.

In the event that a facility fails to comply with the land application requirements for frozen or snow-covered ground for more than two surface application events, then land application on any frozen or snow-covered ground will be prohibited as part of the corrective actions imposed on that facility. See Ohio Adm. Code 901:10-2-14(G).

Pursuant to Ohio Adm. Code 901:10-2-14(G), a facility shall be required in any enforcement to conduct the following "corrective actions:"

1) Collect representative grab samples from discharges of land-applied manure into waters of the State at the point that the discharge enters waters of the State (i.e., concentrated field surface runoff or field tile outlet discharge prior to entrance to surface water) and have the sample analyzed for, at a minimum, the following parameter:

00610 – Nitrogen, Ammonia (NH<sub>3</sub>) – mg/l

2) The facility shall: (a) collect the sample within 30 minutes of the first knowledge of the discharge; or (b) if sampling in that period is inappropriate due to dangerous weather conditions, collect the sample as soon as possible after suitable conditions occur, and document the reason for delay.

3) The facility shall report the results of the discharge sample(s) to ODA DLEP within 14 days of occurrence. The report shall, at a minimum, contain the sample results, describe the reason for the discharge, the location, estimate of quantity and duration of the discharge, and duration of any precipitation leading up to the event, as well as any measures taken to clean up

and eliminate the discharge and required land application records stated above. Laboratory results not available at the time of the report submittal shall be submitted to ODA within five days of receipt.

If the ammonia nitrogen level in a water quality sample is determined to be 26 mg/L or greater in the discharge at the point it enters waters of the State, then any additional surface application of manure to frozen or snow-covered ground is prohibited on the field where the runoff event occurred. In the event that the facility follows the permit requirements and runoff from frozen or snow-covered fields discharges to waters of the State with an ammonia nitrogen content of 26 mg/L or greater in a total of three surface land application events, then surface application of manure on any frozen or snow covered ground is prohibited for that facility for the permit duration.

The facility is responsible for complying with land application activities conducted on each site where the facility, or anyone employed by the facility, owns, operates, or land applies manure generated by the facility or is otherwise responsible for determining the timing and amount of manure to be applied on fields not otherwise owned, rented, or leased by the facility.

The facility or the inspector may provide information based on the site-specific facts of noncompliance that may mitigate referral to the Attorney General's Office and allow issuance of an administrative Notice by the Director.<sup>14</sup>

### 3. Formal Documentation

To address violations, the DLEP Inspector prepares the appropriate enforcement document. The initial draft is submitted to the DLEP Engineer Supervisor, ODA-Legal, and Division Chief to check factual accuracy and for technical review. Drafts of Notices of Deficiencies Resulting in Noncompliance, Notices of Violation, Notices of Hearing, Final Orders, and Emergency Orders are concurrently reviewed by an Assistant Attorney General to analyze sufficiency of the evidence and related case development prior to the enforcement action being issued.

The DLEP Inspector, with assistance from ODA-Legal, prepares a final version of the enforcement document for the approval of the Division Chief. The Division Chief signs Warning Letters, Complaint Follow-Up Reports (for written complaints), Notices of Deficiencies Resulting in Noncompliance, Notices of Violation, Final Orders, Emergency Orders, and referrals to the Office of the Attorney General for judicial enforcement are signed by the Director. For enforcement documents signed by the Director, ODA-Legal works with the Director's executive secretary to have documents signed by the Director and entered into the Director's Journal.<sup>15</sup>

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<sup>14</sup> Ohio Rev. Code § 903.17(A)(1): "The owner or operator is notified in writing of the deficiencies resulting in noncompliance, the actions that the owner or operator must take to correct the deficiencies, and the time period within which the owner or operator must correct the deficiencies and attain compliance."

<sup>15</sup> A Notice of Hearing is not entered into the Director's Journal because it is not a final action of the Director. The Notice of Hearing is sent to ODA's Office of General Counsel in order to prepare for a hearing, in the event that a hearing is requested.

The enforcement document is given to the Program Administrator or delivery to the complainant (where applicable), the facility, the local SWCD office, Ohio EPA, and ODNR. The Program Administrator sends a courtesy copy of the enforcement document to any other individual or entity that the Division Chief believes should receive a copy. Enforcement documents are sent by Certified Mail to the facility. The issuance of each enforcement document is entered and stored into the DLEP database. A copy of the enforcement document is maintained in the database as an electronic record.

#### **D. Enforcement Documents**

Enforcement actions are conducted principally in accordance with Ohio Rev. Code §§ 903.09, 903.15, 903.16, 903.17, 903.18, 903.30, and 903.99. Ohio Rev. Code § 903.12 governs the right of entry to the facility and access to records. In addition, rules set forth in Ohio Adm. Code Chapter 901:10-5 govern enforcement procedures, including penalty assessments and emergency enforcement.

There are several types of enforcement documents prepared by DLEP. The criteria for determining which type of enforcement document will be used is based on the degree of seriousness of the violation and the degree of environmental and/or health effect as analyzed in the context of Ohio Adm. Code 901:10-5-04 and any other factors that advance the goals of Ohio Rev. Code Chapter 903. The Significant Noncompliance (SNC) Policy for Clean Water Act Violations Associated with CSOs, SSOs, CAFOs, and Storm Water Point Sources will also be used to evaluate enforcement decisions when that policy is finalized.

1. Warning Letter: A Warning Letter is issued at the discretion of the Division Chief, based on the results of an inspection, complaint investigation, or file review, together with analysis of supporting documentation including field reports and sampling results, and ODA-Legal analysis and DLEP staff discussion of enforcement, as noted above.

A Warning Letter may be issued for a first-time violation, a minor violation of moderate to low seriousness, or a minor violation of medium to low effect. A Warning Letter includes a brief statement of the nature of the violation; the statute and rules violated; the facts relied upon by the Division Chief in concluding that a violation has occurred; and the requirements that must be met in order for the facility to return to compliance, including a schedule for returning to compliance or a deadline for returning to compliance.

The date the Warning Letter is sent, the Warning Letter, and any date or deadlines for compliance (the compliance schedule) are attached and entered in the DLEP database. Depending on the type, circumstances, and severity of the violation, the Director may opt not to issue a Warning Letter and instead proceed directly to issuing a Notice of Deficiencies Resulting in Noncompliance or referring the matter to the Ohio Attorney General's Office for judicial enforcement.

2. Notices of Deficiencies Resulting in Noncompliance ("NOD"): The NOD is a type of administrative enforcement action issued by the Director in accordance with Ohio Rev. Code §

903.16<sup>16</sup> for violations of state CAFO permitting requirements or Ohio Rev. Code § 903.17 for NPDES violations.

As with the Warning Letter, the Director's NOD includes a brief statement of the nature of the violation; the statute and rules violated; the facts relied upon by the Director in concluding the violation occurred; and the requirements that must be met in order for the facility to return to compliance, including a schedule of compliance or a deadline to return to compliance. The NOD is sent by Certified Mail. Thereafter, continued NPDES noncompliance will result in a Notice of Violation ("NOV"), which may be issued with a Notice of Hearing so as to obtain a civil penalty through Ohio Adm. Code § 903.17 administrative proceedings.

The NOD letters and the dates they are sent are attached and entered in the DLEP database. Where ODA seeks to obtain a penalty in an administrative proceeding in response to violations, re-inspection of the facility is required under Ohio Rev. Code § 903.17(A) to determine whether the owner or operator has returned to compliance before an administrative civil penalty can be imposed. Therefore, at the time that the Director's NOD is issued, the schedule of compliance dates imposed in the NOD is also entered in the DLEP database, and a DLEP inspector is assigned to re-inspect the facility on those dates, or immediately thereafter. As noted above, every inspection must be entered into the DLEP database.

3. Notices of Violation ("NOV") and Notices of Hearing ("NOH"): If, upon re-inspection the owner or operator is still not in compliance, the next administrative enforcement order issued is an NOV under Ohio Rev. Code § 903.17. At the time of issuing an NOV, the Director has the discretion to propose to assess an administrative civil penalty for the violations through a Notice of Hearing for an adjudication hearing to be conducted pursuant to Ohio Rev. Code Chapter 119 and Ohio Rev. Code § 903.17(A) and (B).

If the Director proposes a civil penalty, the Director may include a brief statement regarding the seriousness and gravity of the violation, as well as the proposed penalty, as determined under the provisions of Ohio Adm. Code 901:10-5-04.

NOVs and NOHs are sent by Certified Mail to the owner or operator. A copy of each Notice sent is entered into the DLEP database. The owner or operator has fifteen days from the date of a NOH to request an adjudication hearing before the Director. If a hearing is requested, this request is entered in the DLEP database and the adjudication hearing is scheduled.

4. Final Orders of the Director:

a. Non-emergency final orders

Following the issuance of a NOH, the Director issues a final order. Pursuant to Ohio Rev. Code § 903.17(B), final orders may be issued without an adjudication hearing if the owner or operator waives the opportunity for adjudication hearing by not requesting a hearing in response to the NOH. The Director may issue a final order with or without a penalty.

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<sup>16</sup> The State program includes regulatory authority over insect and rodent control as well as odor control at concentrated animal feeding facilities. Since these requirements are not part of the NPDES program they are not discussed here.



If the owner or operator requests an adjudication hearing pursuant to Ohio Rev. Code § 903.17, the Director may either issue a final order at the conclusion of a hearing, or he may issue a Final Order as a result of a Joint Stipulation and Settlement Agreement entered into by the parties prior to the adjudication hearing. All final orders are attached and entered in the DLEP database.

b. Emergency Orders

Emergency orders are final orders of the Director, issued pursuant to Ohio Rev. Code § 903.18. These orders are issued without notice or an adjudication hearing. Emergency orders can be issued when an emergency exists and the emergency requires immediate action to protect the public health or safety or the environment. Emergency orders take effect immediately and the person to whom the order is directed is required to comply with the emergency order immediately. The person to whom the emergency order is directed may apply for an adjudication hearing in accordance with Ohio Rev. Code Chapter 119. The adjudication hearing shall be held as soon as possible but not later than 30 days after the application for the hearing. At the hearing, the Director decides either to continue the order, to revoke the order, or to modify the order. Pursuant to Ohio Rev. Code § 903.18, an emergency order shall remain in effect for no more than 120 days. All emergency orders are attached and entered in the DLEP database.

In an emergency, the Director can use funds in the “Livestock Management Fund,” created by Ohio Rev. Code § 903.19, to take corrective actions. Any such costs incurred by the Director may be recovered from responsible persons through Director’s final orders or by the Office of the Attorney General, acting upon request of the Director.

c. Administrative Penalty Orders

Pursuant to Ohio Rev. Code § 903.17(E), the Director can impose an administrative penalty against an owner or operator of an animal feeding operation for discharges of pollutants into waters of the State in violation of Ohio Rev. Code § 903.08 or the terms or conditions of a NPDES permit issued by the ODA. The administrative penalty may be imposed in addition to civil penalties authorized by Ohio Rev. Code § 903.17. However, administrative penalties, unlike civil penalties, cannot exceed five thousand dollars. Also, an owner or operator can request an adjudication hearing under Ohio Rev. Code Chapter 119 to challenge the imposition of the penalty or any other determination by the Director under Ohio Rev. Code § 903.17. This administrative enforcement option is currently in effect as part of the State PTI and PTO enforcement program, but will become available to ODA for violations of Section 903.08 or the terms or conditions of a NPDES permit issued by ODA upon approval by U.S. EPA of the NPDES program revision.

5. Attorney General Referral: This enforcement option may be appropriate in a number of circumstances, including cases in which:

- a. As an alternative to emergency orders, described above, the Director may seek immediate action through the Attorney General as necessary to prevent imminent and substantial endangerment to the public health and/or to the environment. The Office of the Attorney General can seek a Temporary Restraining Order or Preliminary Injunction through a court action in an Ohio court of common pleas.



- b. Violations of a Director's final order have occurred;
- c. Department resources and policy may dictate case referral to the Attorney General. Factors to be taken into consideration when deciding whether to refer a case to the Attorney General include the amount of civil penalties to be assessed, recovery of costs incurred by the Director in an emergency action, challenges to the legality or policy of the program, serious or egregious violations, continuing violations, criminal cases, and other such matters as justice requires.
- d. Civil penalties are sought when the violation and the circumstances of the case make it inappropriate or impractical to seek penalties through the NOD/NOV/NOH procedure set forth in Ohio Rev. Code § 903.17(A) and (B) that governs penalties obtained through administrative, as opposed to judicial, enforcement actions.

ODA-Legal will prepare a letter from the Director to the Attorney General naming the owner or operator or both and the operation being referred to the Attorney General for enforcement action and will identify the Director's legal authority to make the referral. The referral will be attached and entered into the DLEP database on the day the Director signs the referral letter.

To accompany the referral letter, ODA-Legal will prepare a confidential memorandum for the Office of the Attorney General describing the nature of the case, the reason for referral, and the relief requested. ODA-Legal will prepare and send relevant inspection reports, memos from staff, correspondence, photos, sampling results, penalty calculation worksheets, a chronology of the case, and any other materials required in support of the case.

6. Permit Revocation: Pursuant to Ohio Rev. Code § 903.09, the Director is authorized to revoke PTIs, PTOs, and NPDES permits. Grounds for permit revocation are set forth in Ohio Adm. Code 901:10-1-03. To revoke a permit, the Director first issues a proposed action stating the Director's intention to revoke the permit and the reasons for the permit action. Pursuant to Ohio Rev. Code § 903.09(F) and Ohio Adm. Code Chapter 901:10-6, notice of the proposed revocation is sent to the permittee by Certified Mail and public noticed in a newspaper in the county where the facility is located or proposed to be located. As in other permitting actions, notice of a proposed revocation is also given to county commissioners, township trustees, and any other person entitled to receive notice under the Clean Water Act, public comments may be received, and a public hearing may be held. A final order regarding the proposed revocation is not issued until the permittee has had an opportunity for an adjudication hearing in accordance with Ohio Rev. Code § 903.09(F) and Ohio Rev. Code Chapter 119. Appeal procedures for permit revocations are set forth in Section 4.H (Administrative and Judicial Review of Permitting Decisions) above. Like other permitting actions, proposed permit revocations and final revocations are attached and entered into the DLEP database.

## **E. Enforcement Tracking and Activities**

### **1. Data Management**

Inspections, complaints, and the various actions in support of enforcement actions, including preparing and tracking all of the enforcement documents described above, are listed and discussed here. Data from the Compliance and Enforcement Program will be provided to U.S. EPA on a quarterly basis as set forth in the Memorandum of Agreement between U.S. EPA and the State of Ohio on behalf of the ODA.

### **2. Data Entry**

The Program Administrator enters all complaints into the DLEP database and all routine inspection dates and complaint investigation dates into the DLEP database. Inspection Reports and their cover letters are given to the Program Administrator to be attached and entered into the DLEP database. The Program Administrator also mails or e-mails all inspection reports to the facility and to others identified by the Division Chief, such as the local SWCD office, Ohio EPA, ODNR, and others. The mailing dates are entered into the DLEP database.

Complaint investigations are given to the Program Administrator and are attached and entered into the DLEP database. The Program Administrator sends the Complaint Follow-Up Reports and any associated letters from the Director to the complainant, the facility, the local SWCD office, Ohio EPA, ODNR, and others identified by the Division Chief.

The Program Administrator enters data relating to enforcement actions for each facility. Any final signed and dated enforcement document is attached in the DLEP database by the Program Administrator. This includes Warning Letters, Notices of Deficiencies Resulting in Noncompliance, Notices of Violation, Notices of Hearing, Final Orders, Emergency Orders, Administrative Penalty Orders, and referrals to the Office of the Attorney General for judicial enforcement signed by the Director.

### **3. Other Activities**

- a. Cases Referred to the Attorney General: Legal works with the Assistant Attorney General in developing the case, particularly by assisting the drafting and review of the Complaint; drafting and responding to discovery requests; scheduling depositions; and drafting and reviewing any settlement agreements, penalty demands, and preliminary and final orders. ODA-Legal serves as a liaison between the Assistant Attorney General, DLEP staff, and ODA management.
- b. Preparation of Final Order Documents: In administrative cases under Ohio Rev. Code §§ 903.17 or 903.09 where the owner or operator waives the right to an adjudication hearing or otherwise forgoes the right to challenge the Director's Notice of Hearing, ODA-Legal prepares a draft administrative order using the appropriate order "shell" or "form" for the final order. ODA-Legal prepares the cover letter to be sent to the owner or operator of the facility. Each order is tailored to the specific technical and regulatory requirements of the case and includes any penalty calculated by the inspector or

engineer assigned to the case. The assigned engineer and inspector, where applicable, will review the draft administrative order for technical and factual accuracy. The draft administrative order is also given to the Assistant Attorney General and Division Chief for review. Following the review, the draft administrative order is returned to ODA-Legal for corrections and/or modifications. After review of the draft order by DLEP staff is complete, the order is given to the Director for his or her review and signature. The final order that is approved and signed by the Director is given to the Program Administrator to attach in the DLEP database and for mailing to the facility, the local SWCD office, Ohio EPA, ODNR, and others identified by the Division Chief. The signed final order is given to the Program Administrator who will arrange with the Public Information Officer at ODA to have the final order published in accordance with Ohio Adm. Code 901:10-6-01(A)(5).

- c. Final Order as a result of a Joint Stipulation and Settlement Agreement: The parties may engage in negotiation following the owner or operator's request for an adjudication hearing arising out of a Notice of Hearing issued under Ohio Rev. Code § 903.17 or a proposed revocation under Ohio Rev. Code § 903.09. If an agreement can be reached through the process of negotiation without a hearing, ODA-Legal will prepare a joint stipulation and settlement agreement and a draft Director's order using the appropriate order "shell" or "form." It is anticipated that the parties may negotiate the allegations, penalty, and corrective actions to be contained in the settlement agreement and draft order. During negotiations, ODA-Legal may recommend changes to the settlement agreement and draft order based on the owner or operator's case as follows:

Additional factual information that affects the assessment of the violation or the penalty calculation; The owner or operator proposes a Supplemental Environmental Project as part of the penalty to be paid; Corrective actions, compliance schedule, and penalty-payment schedule may be negotiable.

The Assistant Attorney General and Division Chief must sign off and agree on any changes before the negotiated settlement is approved. Joint stipulations and settlement agreements are drafted contingent on the Director's issuance of a final order that is identical in substance to the draft order contained in the joint stipulation and settlement agreement. The Director, as the final decision maker under Ohio Rev. Code Chapter 119, is not involved in the negotiation of settlement agreements when an adjudication hearing is pending and may choose whether to issue a final order consistent with the settlement agreement. If the Director issues a final order identical in substance with the draft order in the settlement agreement, the final order is sent to the owner or operator and the case is settled. If the Director does not issue an order consistent with the settlement agreement, the settlement is nullified and the Director's decision is appealable by the owner or operator in accordance with Section 4.H, above. The signed final order is given to the Program Administrator who will arrange with the Public Information Officer to have the final order published in accordance with Ohio Adm. Code 901:10-6-01(A)(5).

- d. Contested Administrative Enforcement Cases: If no agreement can be reached through the process of negotiation, the matter will be referred to a Hearing Examiner, employed by the Department. A hearing will be conducted in accordance with Ohio Rev. Code Chapter 119. At the conclusion of the hearing, the Hearing Examiner will issue a Report

and Recommendation pursuant to Ohio Rev. Code Chapter 119 regarding whether the action sought in the Notice of Hearing or proposed revocation should be approved as a final order, disapproved, or modified. The Report and Recommendation is transmitted to the Office of the Director, ODA, for review and consideration. The Director, in consultation with the Chief Counsel, reaches a determination and issues a final order. The final order is sent by Certified Mail to the facility or its attorney, if any, from the adjudication hearing.

The signed final order is given to the Program Administrator who will arrange with the PIO to have the final order published in accordance with Ohio Adm. Code 901:10-6-01(A)(5), allowing for public notice and an opportunity to file a Notice of Appeal with the ERAC. The final order is also entered into the DLEP database.

e. Penalty Payments:

- 1) Data entry: At the time that a signed final order is given to the Program Administrator for publication, the Administrator shall enter the anticipated date for penalty payment in the DLEP database. Tracking payments by the DLEP database enables enforcement actions to be commenced in the event of nonpayment.
- 2) For administrative enforcement: Final Orders of the Director require that the "proposed civil penalty in the amount of \$\_\_\_\_\_ be paid by check made payable to 'Treasurer, State of Ohio, for the Livestock Management Fund 5L8,' which shall be delivered by mail, or otherwise, to the appropriately identified Program Administrator, at the Ohio Department of Agriculture, Livestock Environmental Permitting Program, A.B. Graham Building, 8995 East Main Street, Reynoldsburg, Ohio 43068."
- 3) For judicial enforcement: Judicial settlements reached by the Office of the Attorney General provide: "Defendant is hereby ordered and enjoined to pay a civil penalty of \$\_\_\_\_\_ within sixty (60) days of the signing of this Consent Order by the Court. The civil penalty shall be paid by certified or cashier's check for the appropriate amount, made payable to 'Treasurer, State of Ohio, for deposit to the Livestock Management Fund 5L8,' which check shall be delivered by mail, or otherwise, to the Ohio Attorney General's Office, Environmental Enforcement Section, 30 East Broad Street, 25<sup>th</sup> Floor, Columbus, Ohio 43215-3400."
- 4) Inability to Pay: Owners or operators may present evidence in an effort to prove that they are unable to pay all or part of a proposed penalty. Alternatively, the owner or operator may present evidence in an attempt to prove that he/she requires additional time in order to pay the penalty, or needs to pay the penalty in installment payments. The owner or operator must present financial documents to substantiate a claim of inability to pay, such as copies of actual tax returns filed for the three-year period immediately prior to the case. Prompt submittal of the financial documentation is required and the final decision on the amount of penalty is made by the State.

- 5) **Failure to Pay:** In the event that an owner or operator fails to pay the penalty at the conclusion of the enforcement proceedings, the matter is referred to the Office of the Attorney General for collection proceedings.
- f. **Compliance with Final Orders:** The DLEP inspectors and/or Engineers with the assistance of the Program Administrator will monitor the provisions of any enforcement order issued as a result of enforcement proceedings to determine whether corrective actions are fully complied with. The Program Administrator will check to determine if the penalty payment requirements are met. Any subsequent noncompliance is reported to the DLEP office staff and discussed internally by either teleconference or a staff meeting. Failure to achieve compliance with the provisions of any final order issued by the Director is considered a major violation according to Ohio Adm. Code 901:10-5-04. In such a case, further enforcement action will be pursued through a referral to the Office of the Attorney General.

**F. Citizen Suits**

If the Director has taken no action against a violator, ODA recognizes that a person having an interest, which is or may be adversely affected by a violation of the Clean Water Act may commence a civil action in his or her own behalf against the violator pursuant to Section 505 of the CWA (33 U.S.C. § 1365). Before commencing such an action, the plaintiff must send a 60-day notice of his or her intent to file suit to the U.S. EPA Administrator, ODA, and the alleged violator of the CWA. If the Director commences a court case against the alleged violator in response to the 60-day notice, ODA recognizes that the aggrieved person may file a motion to intervene in that action.

**End of Program Description**